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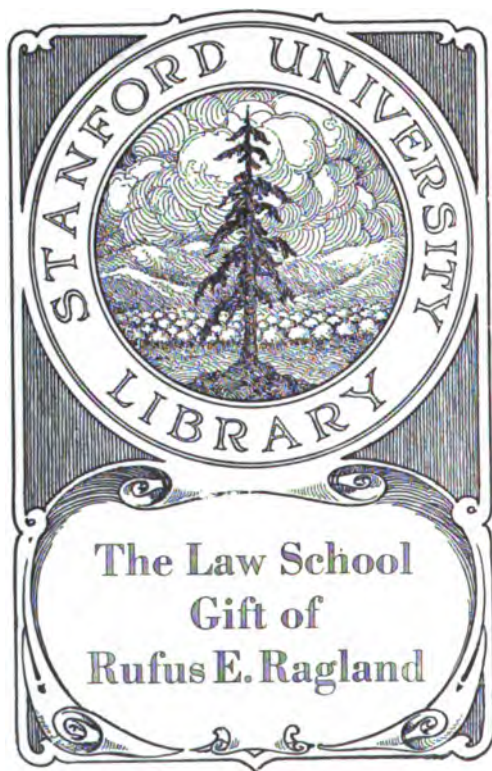
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AMERICAN NEGLIGENCE REPORTS

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**ALL THE CURRENT NEGLIGENCE CASES DECIDED IN THE FEDERAL
COURTS OF THE UNITED STATES, THE COURTS OF LAST
RESORT OF ALL THE STATES AND TERRITORIES AND
SELECTIONS FROM THE INTERMEDIATE COURTS**

**TOGETHER WITH
NOTES OF ENGLISH CASES AND ANNOTATIONS**

**EDITED BY
JOHN M. GARDNER
OF THE NEW YORK BAR**

VOL. I

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1897**

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PREFACE.

The ever-increasing number of adjudicated cases upon the subject of Negligence and the growing importance of this branch of law to the legal profession, renders it essential that the practitioner should be abreast with the multitudinous points governing the law of negligence, and to meet this requirement the series, of which this is the first volume, of AMERICAN NEGLIGENCE REPORTS is issued.

In all professions the division of labor into special branches has proven of great convenience and, as a time saver, invaluable to the busy worker. The legal profession is beginning to appreciate the fact that specialty in practice is helped by special reports of cases in the branch in which it is interested, and in none, perhaps, is this more desirable than in the practice of negligence law. Within a quarter of a century negligence practice has so increased that to-day it stands practically at the head of all branches of jurisprudence in the number and multifarious nature of cases adjudicated. The mass of litigation on damage suits bears testimony to the fact that the public is keenly alive to its rights in matters affecting its safety in methods of transportation, use of highways and streets, duties of employers and employees in dangerous occupations, and other relations involving protection to life and property.

It is deemed a favorable time to publish a new series of law reports dealing exclusively with cases arising out of negligence, and with the view of assisting the busy practitioner to find the latest case in point, this series of AMERICAN NEGLIGENCE REPORTS contains all the current cases upon negligence decided in the courts of last resort in all the States and territories, the United States Circuit Courts, Circuit Courts of Appeals, and Supreme Court, together with selections of cases from intermediate courts, beginning with decisions rendered in January of the present year, and continuing as far as possible to decisions rendered to date of publication of volume, to which are added notes of English cases and annotations. As a further convenience, the series is issued

in monthly advance sheets, so that the lawyer may follow from month to month the progress of litigation in damage suits.

An arrangement of the cases grouped under their respective States will, it is thought, prove of great advantage to the practitioner, as the trouble of searching through a miscellaneous collection of reports for cases in the particular State in which the lawyer is interested, is thus avoided.

The volumes will contain reports of all actions arising out of negligence of Carriers of Freight, Carriers of Passengers, Master and Servant, Municipal Corporations, Railroad Corporations, Public and Private Corporations, etc., decided in the period covered herein, in Alabama, Arizona, Arkansas, California, Colorado, Connecticut, Delaware, Florida, Georgia, Idaho, Illinois, Indiana, Indian Territory, Iowa, Kansas, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, Montana, Nebraska, New Hampshire, New Jersey, New Mexico, New York (Court of Appeals, Appellate Division, Supreme Court and trial courts), North Carolina, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Carolina, South Dakota, Tennessee, Texas, Utah, Vermont, Virginia, Washington, West Virginia, Wisconsin, Wyoming, the Circuit Courts of the United States, the Circuit Courts of Appeals, and the Supreme Court of the United States.

A new and novel feature of the work, in connection with and preceding the Index, is the Table of Cases Classified according to the cause of action and the injuries sustained, enabling the practitioner to immediately find a case in point. This table also classifies the actions brought against Carriers, Railroad Corporations, Municipal and other Corporations, and those relating to Master and Servant.

The editor cordially acknowledges the able services of Mr. Walter J. Eagle, and of Mr. Alfred J. Hook of the Brooklyn Law Library, in the preparation of the cases and notes thereto.

JOHN M. GARDNER.

NEW YORK, *July*, 1897.

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AMERICAN NEGLECTANCE REPORTS.

KANSAS CITY, FORT SCOTT AND MEMPHIS RAILWAY COMPANY v. M'GAHEY.

Supreme Court, Arkansas, January, 1897.

BAGGAGE DESTROYED BY FIRE.—LIABILITY AS WAREHOUSEMAN.—

In a case where a passenger fails to demand his baggage on arrival at destination, and the same is stored by the carrier in its warehouse, and is destroyed by fire, the passenger must, in order to recover, show that the fire was the result of defendant's negligence in its capacity as warehouseman, defendant not being liable as carrier (1).

APPEAL from judgment for plaintiff rendered in the Circuit Court, Sharp county.

WALLACE PRATT and OLDEN & ORR, for appellant.

PHILLIPS & HORTON, for appellee.

Plaintiff and his baggage arrived at Mammoth Springs, at 11:08 o'clock at night. There were no conveyances at the depot, or

1. The court accepted the definition of "baggage" as given by Lord Chief Justice Cockburn in *Macrow v. Railway Co. L. R.*, 6 Q. B. 612, which is as follows: Baggage is "whatever the passenger takes with him for his personal use or convenience, according to the habits or wants of the particular class to which he belongs either with reference to the immediate necessities or to the ultimate purpose of the journey."

In *Railroad Co. v. Swift*, 12 Wall. 272. Mr. Justice Field said that the

contract of the carrier to carry a passenger, as to baggage, "only implies an undertaking to transport such a limited quantity of articles as is ordinarily taken by travelers for their personal use and convenience, such quantity depending, of course, upon the station of the party, the object and length of his journey, and many other considerations."

The statutory rule in Arkansas in regard to baggage is that "each passenger who shall pay fare * * * shall be entitled to have transported

running at that hour. They were in the city "a mile's distance from the defendant's depot." Plaintiff, although he saw his baggage on the platform, made no demand for it during the night of its arrival, but left it in possession of defendant, who stored the same in its warehouse, which was destroyed by fire during the night. According to the evidence, it appears that plaintiff had a reasonable time in which he might, with the use of diligence, have received and removed his baggage before the fire occurred. There is no excuse given for his failure to do so, except the lateness of the hour, and the fact that no vehicles were at the depot or "running" that night, by which it could have been removed. This merely shows that it was inconvenient for him to remove it during the night (1). This, in the absence of a better showing, was not sufficient to extend the reasonable time, within which the plaintiff should call for it, to the next morning, so that it not being called for, the defendant became liable for its custody as a carrier. Citing *Ouimit v. Henshaw*, 35 Vt. 616. Defendants not being liable, as common carriers, for the loss of the baggage of plaintiff, before he could recover on account thereof, it was necessary for him to show that the fire was the result of such negligence of the railroad company as would make it liable as a warehouseman for him, which he failed to do.

Judgment reversed.

Opinion by BATTLE, J.

along with him, on the same train, and without additional charge, one hundred and fifty pounds of baggage, to consist of such articles as are usually carried by ordinary persons when traveling." Sand. & H. Dig. § 6215. With the exception of the amount the statute is substantially the contract of the carrier with the passenger as stated in *Railroad Co. v. Swift*, above cited.

The plaintiff's baggage consisted of that belonging to himself and family for which three tickets were taken, and the excess of baggage over the amount allowed was paid. The weight of the baggage was over 500 pounds.

1. Railroad companies are responsible as common carriers for the baggage of their passengers, which responsibility continues until the baggage is ready to be delivered to the owner at the place of his destination, and until

he has had a reasonable time and opportunity to come and take it away. If it be not called for in a reasonable time, the company may store it in a secure warehouse, when it becomes a mere warehouseman, and is then bound only to such care that ordinarily prudent men would exercise in keeping their own goods of similar kind and value. *Mote v. Railroad Co.* 27 Iowa, 22; *Railroad Co. v. Boyce*, 73 Ill. 510.

What constitutes a reasonable time and opportunity is ordinarily a mixed question of law and fact, and when there is dispute it is for the jury to determine under the court's instructions as to the law, but where there is no dispute it is for the court to decide. *Railroad Co. v. Boyce*, 73 Ill. 510; *Railroad Co. v. Mahan*, 8 Bush, 184; *Roth v. Railroad Co.* 34 N. Y. 548.

**KANSAS AND ARKANSAS VALLEY RAILROAD
COMPANY ET AL. V. AYRES.**

Supreme Court, Arkansas, January, 1897.

CARRIER OF FREIGHT—INJURY TO CATTLE—EVIDENCE.—There is some evidence of negligence where the carrier's agent induced a person to load his cattle on cars in time for a train that was to start in the morning, but the train did not leave till the evening, by reason of which delay the cattle were injured.

APPEAL by railway company from judgment for plaintiff rendered in Circuit Court, Sebastian county.

DODGE & JOHNSON, for appellants.

GRACE & FORRESTER, for appellee.

Action against the railway company to recover damages for injury to plaintiff's cattle due to negligence of railway company in not having train ready on time according to contract. It appeared that the cattle were shipped at Muldrow, for Lenapah, in the Indian Territory. The contract was made with the appellants' agent at Fort Smith, who informed appellee that the train to carry his stock would leave Muldrow at 10:42 A. M., and appellee accordingly loaded his cattle for that time, but no train stopped for his cattle until 5:30 P. M. on the same day. The cattle arrived at Lenapah the next day at 5:30 A. M., and when unloaded it was found that there were four dead cattle, a number down, and the balance in bad condition. On the trial plaintiff recovered judgment for \$250. There is evidence to support the charge of negligence on the facts as stated, the reason for the carrier's failure to run the train on time, that there was not sufficient freight to warrant it, being unknown to plaintiff.

Judgment, however, was reversed for error in giving judgment for the damage to all the cattle claimed to have been injured, the plaintiff having failed to give notice of claim for damages as per contract, and new trial ordered.

Opinion by HUGHES, J.

BATTLE, J. dissented.

PETERS v. BOWMAN.

Supreme Court, California, December, 1896, and January, 1897.

BOY DROWNED IN ARTIFICIAL POND WHILE TRESPASSING.—The owner of an unfenced lot upon which a pond is formed in the rainy season by surface water is not liable for the death of a boy who was drowned while trespassing.

APPEAL from judgment of Superior Court, city and county of San Francisco, in favor of defendant in action by Henry Peters against C. E. Bowman.

GEO. D. COLLINS, for appellant.

MYRICK & DEERING, for respondent.

Plaintiff brought the action for damages for death of his infant son drowned in a pond of water upon a lot of land owned by the defendant. The water used to run off the lot until a street was graded by the city of San Francisco on the side towards which the land sloped, since which time the water accumulated in the rainy season, forming a pond which disappeared during the dry season. Defendant did nothing to create the pond or to prevent the water from flowing away. The plaintiff knew of the existence of the pond and that his son, who was 11 years old, knew of it, and he never told the boy "not to go rafting on the pond." The boy was drowned while playing on a raft that was floating on the pond. The general rule is that the owner of land is under no obligation to keep his premises safe for trespassers, whether children or adults (Whitt. Smith, Neg. [2d ed.] p. 67), and governs this case. The rule of the Turntable Cases is not applicable. That rule is approved in this State, *Barrett v. Southern Pac. Co.* 91 Cal. 296, 27 Pac. 666, but should not be carried beyond the class of cases to which it has been applied. It has been repeatedly held that damages cannot be recovered for the death of a child drowned in a pond or private premises who had gone there without invitation. *Klix v. Neman*, 68 Wis. 271, 32 N. W. 223; *Overholt v. Vieths*, 93 Mo. 422, 6 S. W. 74; *Hargreaves v. Deacon*, 25 Mich. 1; *Gillespie v. McGowan*, 100 Pa. St. 144; *Richards v. Connell*, 45 Neb. 467, 63 N. W. 915 (1).

Judgment affirmed.

Opinion by MCFARLAND, J.

1. On motion for rehearing in January, 1897, which was denied, the court criticised the case of *City of Pekin v.*

McMahon, 154 Ill. 141, 39 N. E. 484, which was similar to *Peters v. Bowman*, and in which the court of Illinois

SIEVERS v. CITY AND COUNTY OF SAN FRANCISCO.

Supreme Court, California, January, 1897.

GRADING STREET — MISTAKE OF ENGINEER AS TO LEVEL.—Where a municipality ordered a street to be graded up to the "official grade" and the city engineer gave the level to the contractor eight feet above, which additional filling caused surface water to back upon plaintiff's land, the city was not liable, as the rule of *respondet superior* does not apply for the negligence of an officer in the discharge of a duty imposed by law.

APPEAL from judgment of nonsuit of Superior Court, city and county of San Francisco, in action by John H. Sievers against defendant.

OTTO SUM SUDEN (F. W. REYNEGOM of counsel), for appellant.

H. T. CRESSWELL and RHODES BORDEN, for respondent.

Plaintiff brought his action to recover of the defendant damages for injury occasioned to his property by the grading of Van Ness avenue at the crossing of Chestnut street. The work as done dammed a well-defined channel, through which surface water was wont to flow and backed the water upon the land of plaintiff. The official grade was seventy-five feet, but the city engineer and surveyor assumed eighty-three feet to be the official grade and the contractor filled it accordingly. The injury was caused by the extra eight feet of superimposed earth. The contract by the authorities was to grade to the "official grade and line." The case differs radically from the many cited and relied on by appellant where the injury resulted from work done for and as directed by the municipal authorities (1).

Where the injury results from the wrongful act or omission of an officer charged with a duty prescribed and limited by law, the officer is not treated as the servant or agent of the corporation in the performance of these duties thus expressly enjoined, but is held to be the servant and agent of and controlled by the law, and for his acts the municipality will not be held liable (2). In this particular

arrived at a different conclusion, holding that the rule in the *Turntable Cases* applied.

23 Pac. 1091; *Eachus v. Railway Co.*, 103 Cal. 614, 37 Pac. 750; *Tyler v. Tehama Co.*, 109 Cal. 618, 42 Pac. 240.

1. Citing *Reardon v. San Francisco*, 66 Cal. 492, 6 Pac. 317; *Conniff v. San Francisco*, 67 Cal. 45, 7 Pac. 41; *Spangler v. San Francisco*, 84 Cal. 12,

2. Citing *Crowell v. Sonoma Co.*, 25 Cal. 313; *Winbigler v. Los Angeles*, 45 Cal. 36; *Chope v. City of Eureka*, 78 Cal. 588, 21 Pac. 364.

matter the surveyor and street superintendent were the servants of the law, not of the supervisors, and could no more bind the city by instructing the contractor above the line called for by the city than they could bind it by instructing the contractor to take his dirt for filling from plaintiff's private property.

Judgment affirmed.

Opinion by HENSHAW, J.

VERDELLI v. GRAYS HARBOR COMMERCIAL COMPANY

Supreme Court, California, January, 1897.

MASTER AND SERVANT—DANGEROUS MACHINE—INSTRUCTING EMPLOYEE.—In an action for personal injuries where it appeared that the plaintiff was a minor, 18 years of age, and was directed by the foreman to operate a planing machine, and no instructions were given as to the dangerous character of the machine, or how to operate it, although he was known to be inexperienced, the company was liable for injuries sustained by the plaintiff falling upon the knives while so engaged as directed.

GENERAL VERDICT.—Where it was alleged that defendant was guilty of negligence in several respects, and there was evidence supporting one allegation, a general verdict would not be set aside.

PRIVILEGED COMMUNICATION.—A communication made to his attorney by the plaintiff before the attorney communicated with the defendant is privileged, and a question asked plaintiff by defendant concerning it was properly excluded.

EVIDENCE.—It cannot be shown that other boys were properly instructed in the use of a dangerous machine, on an issue as to whether the plaintiff had been instructed.

APPEAL from judgment of Superior Court, city and county of San Francisco, in favor of plaintiff Andrew Verdelli in action against defendant for personal injuries.

VAN NESS and REDMAN, for appellant.

WALTER P. STRADLEY and WM. M. CANNON, for respondent.

Plaintiff was 18 years and 5 days old when he was injured in plaintiff's box factory while operating a planing machine known as a "pony planer." His hand was caught in the knives of the machine and was so injured that it had to be amputated. He obtained a verdict for \$7,500 which the court reduced, on motion for new trial, to \$5,000 and judgment was entered for that amount. Plaintiff testified in substance that he had never operated a planing machine until

about two months before he was hurt, and during that time he had worked on it only off and on, not regularly. He had been in the employ of the defendant about seventeen months. Sometimes he would go on the machine maybe once a week or two or three times a week and assist on it for an hour or two a day, and during that time he had planed only light stuff — "tea stock" and "orange stock," as it is called — but never heavy stuff such as he was planing at the time of the accident. He had never been instructed by the foreman of the defendant or by any of its agents or employees how to operate the planer or warned of the danger to which he might be exposed in operating it. The plaintiff further testified that while he was standing by the machine, about to go to work, the foreman came along and told him to go ahead with his work. That he went to work on some stuff eighteen inches wide and one and one-fourth inches thick. He set his planer to take off one-sixteenth. He got two pieces through and set his gauge down to take off another sixteenth so that the stuff would then be one inch thick. While he was putting it through the planer it got stuck, so he pushed it to force it through, and when it was nearly through the board gave way all at once like a jerk and he lost his balance, and while grasping some object, called the bonnet, over the knives his foot slipped and his hand went in among the knives and was cut off. It was also proved by expert witnesses that the pony planer was designed to do very light work, that to plane a board such as the plaintiff was handling the belts should be tightened, and to plane it down one-sixteenth it should be run through twice, taking off one-thirty-second of an inch at a time. The law applicable to cases of this kind has been many times declared by this court. *Ingerman v. Moore*, 90 Cal. 410, 27 Pac. 306; *Mullin v. Horseshoe Co.*, 105 Cal. 77, 38 Pac. 535; *Ryan v. Storage Co.*, 112 Cal. 244, 44 Pac. 471; *Foley v. Horseshoe Co. (Cal.)* 47 Pac. 42.

The questions were properly submitted to the jury. An instruction that if the superintendent or foreman of the defendant was negligent in putting the plaintiff to work without proper instructions such negligence is in law that of the defendant and the defendant is liable for it, was proper.

The syllabus states the other points decided.

Judgment affirmed.

Opinion PER CURIAM.

CUNNINGHAM v. LOS ANGELES RAILROAD COMPANY.

Supreme Court, California, January, 1897.

INJURY TO CHILD ON TRACK—ORDINARY CARE—INSTRUCTIONS.—

In an action for personal injuries to a child that escaped from its parents' premises and was run down by defendant's car, it was error to instruct the jury that in determining the negligence of defendant in not stopping its car, they might consider the fact that the motorman "had only been at work twelve days," as the defendant only owed to plaintiff the exercise of ordinary care, and the issue was to be determined by what took place at the time of the accident.

CHARGE.—For the same reason it was error to charge that the company was bound to provide "proper cars and appliances, and to provide safe, skilful, watchful and competent servants to manage the same," without qualifying it with the further charge that so far as plaintiff was concerned it was bound to exercise only ordinary care in the selection of the servants.

APPEAL from judgment of Superior Court, Los Angeles county, in favor of plaintiff in action for personal injuries.

BICKNELL & TRASK, for appellant.

MURPHY & GOTTSCHALK, for respondent.

Plaintiff, an infant of eighteen months, escaped from the premises of its parents into the public street and went upon the track of defendant's electric railway running thereon and was knocked down and injured by one of its cars.

The jury were instructed that in determining whether the defendant was negligent in not stopping its car so as to avoid the injury, they had the right to take into consideration the fact that the motorman "had only been at work about twelve days," according to his own testimony, "and was a new hand on the road." There was no direct issue upon the question whether the defendant had been guilty of employing incompetent servants, the question being whether the plaintiff was injured through the actual negligence of defendant's servants. Defendant was responsible to plaintiff for a want of ordinary care only. The question was, did the servant exercise ordinary care to avoid the injury? If he did, the plaintiff could not recover no matter how wanting the servant may have been in general competency; while if he did not exercise such care, plaintiff was entitled to recover even if the servant possessed the utmost degree of efficiency and skill in the performance of his duty. *Deering, Neg. sec. 407; 2 Thomp. Neg. 408; Jacobs v. Duke, 1 E. D. Smith, 271;*

Chase v. Railroad Co., 77 Me. 62; *Towle v. Improvement Co.*, 98 Cal. 342, 33 Pac. 207. See large number of citations in last case cited.

The court also charged that it was the duty of the defendant to provide "proper cars and appliances and to provide safe, skilful, watchful and competent agents and servants to manage the same." The duty was correctly stated, but so far as the defendant's obligation to the plaintiff was concerned, it was only called upon to exercise ordinary care, and the jury should have been so informed. The instruction was deficient in this qualification. The court should have refrained from charging that the law does not require parents to keep an attendant with their young children; and that they are not required to shut them up.

Upon the question of contributory negligence by plaintiff's parents, assuming such negligence clearly appeared, it was a question for the jury whether defendant could have avoided the injury.

The averment of negligence in general terms was sufficient and not open to demurrer.

Judgment reversed and new trial granted.

Opinion by VAN FLEET, J.

FAIRBANKS v. SAN FRANCISCO AND NORTH PACIFIC RAILWAY COMPANY.

Supreme Court, California, January, 1897.

JOINDER OF CAUSES OF ACTION IN ACTION FOR NEGLIGENCE IN SETTING FIRE TO BUILDING.—The owner of a building and an insurance company may maintain a joint action against a railway company for having negligently set fire to the building that was insured and loss paid, though there are allegations in the complaint of damages to the owner's business.

APPEAL from judgment, Superior Court, city and county of San Francisco, in favor of plaintiffs.

SIDNEY V. SMITH, for appellant.

VOGELSANG & BROWN, for respondents.

Fred E. Fairbanks and the National Fire Insurance Company joined in this action to recover damages for the destruction of a certain building by fire resulting from defendant's negligence. It was alleged in the complaint that the building was the property of Fairbanks, of the value of \$1,835, and insured by the insurance company for \$900, which latter sum said company paid to Fairbanks

before the commencement of the action; also, that Fairbanks' business, carried on in the building, was interrupted by its destruction to his loss of profit stated at \$300. Plaintiffs prayed damages in the sum of \$2,135. A demurrer to the complaint for misjoinder of plaintiffs and of causes of action was overruled and defendant answered.

Defendant claims that the joinder of plaintiffs was rendered improper by the allegations of injury to Fairbanks' business, a source of damage in which the insurance company had no interest. But the same objection would apply to the value of the building above the amount of the insurance policy; and that this may be recovered in a joint action, such as the present, is conceded by defendant and is established by authority upon sound considerations of justice and expediency. *Swarthout v. Railway Co.*, 49 Wis. 625, 6 N. W. 314; *Crandall v. Transportation Co.*, 16 Fed. 75; *Home Mut. Ins. Co. v. Oregon Ry. & Nav. Co.*, 20 Ore. 569, 26 Pac. 857. The negligence which gave rise to the action was the single cause of the whole injury.

Opinion by BRITT, C.

PER CURIAM. Judgment affirmed on foregoing opinion.

DENVER & RIO GRANDE RAILROAD COMPANY v. PILGRIM.

Court of Appeals, Colorado, January, 1897.

DERAILMENT OF TRAIN — ALLEGATION AND PROOF.—Where a train was proved to have been improperly made up and it was alleged that that was the cause of the derailment, and there was proof that the cause of the derailment was a snowslide and the make up of the train had nothing to do with it, an instruction that if the train was derailed because of negligence in making it up plaintiff could recover for the injuries received, was error.

APPEAL from judgment of District Court, Arapahoe county, in favor of plaintiff in action by Christopher A. Pilgrim against the railroad company.

WOLCOTT & VAIL and HENRY F. MAY, for appellant.

CAYPLESS & BROWN, for appellee.

This was an action by a porter of a Pullman sleeper to recover damages for injuries sustained through alleged negligence of the railroad company. It appeared that the train was made up with an engine and snowplow at the head of the train, behind this a flanger

and thereafter came two engines. The air controlling the brakes on the train was connected with the one in the rear. There was some testimony offered which tended to show that the use of a flanger between the forward locomotive and those attached for hauling purposes was a dangerous method of coupling a train. The plaintiff's theory was that the accident was occasioned because the train was made up in this particular manner and run over a curve and through a cut filled with snow, and that by reason of such combination of circumstances the cars were forced from the track. There is no question that the cars left the track, went down the embankment and that the porter was carried with the sleeper to the bottom and was quite severely cut and suffered injury. It is a debatable question whether the porter was or was not a fellow-servant. We do not decide the question. We concede, for the purposes of this opinion, that he was a passenger. There was no evidence that the accident resulted from the company's negligence. There was proof that the accident did not result from the company's negligence, but from circumstances over which it had no control. The train had not reached the cut nor the curve at which the plaintiff alleges the accident happened; nor was it derailed because it was made up in this way, and running over the curve and through the cut. The train was on a straight piece of track and was pushed off by a snowslide which came down the mountain. A snowslide had never been known at that point before nor has one ever been heard of since. It seems to us that the situation of the case did not authorize the court to tell the jury that if they found that the train was made up in violation of its rules and in a negligent and dangerous manner, and by reason of this fact the cars were thrown off the track, they might find for the plaintiff, because there was nothing in the case to show this to be true. What the plaintiff proved, the evidence which the defendant offered either or both together wholly failed to warrant a finding that the accident resulted from the way the train was made up.

Judgment reversed.

Opinion by BISSELL, J.

**DENVER & RIO GRANDE RAILROAD COMPANY
v. NYE.**

Court of Appeals, Colorado, January, 1897.

HORSES KILLED BY TRAIN.—Where horses were seen by the engineer on the right of way of the railroad, and were killed by a collision with the engine that was not slowed down as the horses were approached by the train, the question of negligence was for the jury, and a judgment entered on a verdict for the plaintiff was sustained.

DEFENSE.—It was no defense that the right of way was inclosed by a lawful fence.

REMARKS OF COUNSEL TO JURY.—Improper remarks of counsel when promptly stopped by the court not cause for reversal.

DAMAGES.—Amount of recovery could only be had for injury caused by locomotive running into horses.

APPEAL from judgment of District Court, Montrose county, in favor of plaintiff in action by S. W. Nye against the railroad company.

WOLCOTT & VAILE, and W. W. FIELD, for appellant.

BLACK & CATLIN, for appellee.

This was an action to recover the value of two horses killed in the day time by the alleged negligence of the defendant in operating its engine. The testimony showed that eight or ten horses escaped through an open gate onto the defendant's track, where they were seen by the engineer three-fourths of a mile away, "a good long ways," and that he attempted to go through the herd without slowing down, and as the engine got up even with them they began to run and attempted to cross the track, and two of them were struck and so badly injured that they had to be killed. The train was running at the rate of thirty miles an hour. The question of negligence was one of fact and properly left to the jury. The view was unobstructed. What, under the circumstances, a herd of horses would do could not be anticipated. Not knowing what they would do, it seems that common prudence would require that in any attempt to pass them the train should be "slowed down" and under perfect control, so it could at once be stopped in case the horses should attempt, as they did, to cross ahead of the engine. The defense of the right of way being fenced with a lawful fence was properly rejected. It was immaterial whether the horses were rightfully or wrongfully there; the duty of the engineer was to prevent a collision as far as possible. As soon as the court's attention was called

to the objectionable argument of the plaintiff's attorney, it was stopped. Consequently no error could be predicated upon it. The amount of recovery would be the difference between the value of the horses just prior to the injury and the value thereafter as injured. The defendant would not be responsible for any injury to the horses in attempting to jump the fence or in any way caused other than being run into or against by said train.

Judgment affirmed.

Opinion by REED, P. J.

DENVER & RIO GRANDE RAILROAD COMPANY v. PRIEST.

Court of Appeals, Colorado, January, 1897.

INJURY TO STOCK.—Injury to stock that passed through a gate upon defendant's track not proof of negligence to warrant verdict.

APPEAL from judgment of District Court, Fremont county, in favor of plaintiff in action by James W. Priest against defendant to recover damages for stock killed on track.

WOLCOTT & VAILE and W. W. FIELD, for appellant.

JOSEPH H. MANKIN, for appellee.

Where it was shown that the plaintiff's stock passed through a gate which had been left open without any fault of the defendant and went upon the track where they were killed about 1:30 in the morning by a train that was traveling at an ordinary rate of speed, and that the shortest practical distance in which such a train could be stopped was 450 feet, the utmost limit at which under the most favorable circumstances the headlight would show obstructions, there was no proof of negligence warranting a verdict for plaintiff.

Judgment reversed.

Opinion by REED, P. J.

PIERCE ET AL. v. WALTERS.

Supreme Court, Illinois, January, 1897.

INJURED BY TRAIN ON TRACK—ORDINARY CARE—INSTRUCTION.—

Where an engineer fails to exercise ordinary care to prevent injury to a person upon the railroad track who was trying to rescue a child from danger, an instruction that the plaintiff cannot recover unless the injury was

wilfully inflicted was properly refused, and the railroad company is liable for its servants' negligence.

APPEAL from judgment in the Appellate Court, Third District, which affirmed a judgment for plaintiff in Circuit Court, Coles county.

W. P. TYLER and CHARLES G. GUENTHER, for appellants.

HUGHES & HAYES and J. W. CRAIG, for appellee.

Action brought in the Circuit Court of Coles county, to recover damages for a personal injury received by being struck by a locomotive. The accident occurred on a railroad bridge of the company in June, 1893, the road at that time being in the hands of Samuel R. Callaway as receiver. The original declaration was of two counts, charging that the injury resulted from the gross negligence and wilful misconduct of the servants of the receiver. On the return day he appeared and filed his petition and bond for the removal of the case to the United States Circuit Court for the Southern District of Illinois, but the petition was denied. Afterwards, plaintiff amended his declaration by joining Keep, the engineer in charge of the locomotive at the time of the accident, as a party defendant. On the first day of the next term, Pierce, successor to Callaway as receiver, also filed a second petition for the removal of the cause to the United States Court, but it was also denied. After making Keep a party, the declaration was further amended, two additional counts being filed. They each, in substance, aver that, after the engineer Keep and other servants of the defendant in charge of the train saw the plaintiff upon the bridge, they could, by the exercise of ordinary care after becoming aware of his position, have brought the train under control, and avoided striking and injuring him, but negligently failed to do so. The second of these counts also charges that, after seeing him, the defendant Keep and other servants of the defendant receiver wilfully and wantonly ran the engine upon him. A plea of not guilty was filed, and a trial by jury resulted in a verdict and judgment for the plaintiff for \$2,500, which judgment was affirmed by the appellate court.

The declaration proceeds throughout upon the admission that the plaintiff was wrongfully upon the bridge at the time of the accident, and could only recover by proving that the conduct of the defendants was wanton and wilful, or that, after discovering his perilous position, they did not exercise ordinary care to avoid the accident. The last two counts are upon the latter theory, and the trial was had upon the issue formed on these counts. Thus, the court instructed the jury, at the instance of the defendants: "9. You are instructed that, if it appears from the evidence in this cause that the plaintiff

was a trespasser upon the track or bridge of the defendant receiver at the time he was struck and injured, then said defendant receiver was not required, and the law did not impose any duty whatever upon his engineer, to discover the plaintiff's presence upon the same, but only required him, after he discovered the plaintiff, and had knowledge that he was in a perilous position, to exercise reasonable care and prudence to avoid collision; and if it further appears that the engineer did exercise such care and prudence,—did everything within his power to prevent the train from colliding with said plaintiff after he discovered him,—then your verdict must be for the defendants. 10. The defendants are liable in this case only if the engineer failed to exercise ordinary care to prevent the injury, after he became aware of the danger to which the plaintiff was exposed; and by ordinary care is meant such care as would be ordinarily used by a prudent person performing a like service under similar circumstances." Two instructions were given on behalf of the plaintiff, and they each lay down the same rule as to the defendants' liability stated in the foregoing instructions, and correctly announce the law, as held in *Railroad Co. v. Noble*, 142 Ill. 578, 32 N. E. Rep. 684, and *Railroad Co. v. Jones*, 163 Ill. 167, 45 N. E. Rep. 50.

Whatever may be said as to the weight of the testimony on the question whether the engineer did exercise due care to avoid the injury after he discovered the plaintiff, as an original question, it must be conceded that it is foreclosed by the judgment of affirmance in the Appellate Court. Three instructions asked by the defendants were refused, but they did not go to that question of fact; and if they had been free from objection, in view of those given, there would have been no reversible error in their refusal. They did not, however, state the law correctly. The eighth states that an engineer is not bound to stop his train the moment he sees a person on the track, but has the right to presume that such person will leave the track in time to escape danger, and, without being negligent, may continue to run the train until he discovers that such person is heedless of danger. This instruction ignores the fact that the plaintiff was upon a bridge of considerable elevation, and could not, therefore, step out of danger. A similar instruction was condemned in the case of *Railroad Co. v. Slater*, 139 Ill. 199, 28 N. E. Rep. 830. The seventeenth instruction, which was also refused, was to the effect that, if the plaintiff was endeavoring to rescue the little girl from danger at the time he was struck, he could not recover unless the injury was wilfully inflicted. It has been seen that it became the duty of the engineer, upon discovering the perilous position of the plaintiff, to use reasonable care to avoid injuring him; and it is

clear that what he may have been doing at the time could in no way lessen that duty,—that is to say, the fact that he may have been attempting to save the child would furnish no excuse for less care on the part of the engineer than if he had been otherwise engaged. What he was doing at the time, whether attempting to rescue the little girl or doing nothing, could only be material in the case as affecting the question as to whether he used due care for his own safety. The case was properly submitted to the jury.

Judgment affirmed.

Opinion by WILKIN, J.

EBSEY v. CHICAGO CITY RAILWAY COMPANY⁽¹⁾.

Supreme Court, Illinois, January, 1897.

BOARDING CABLE CAR—SPECIAL FINDING INCONSISTENT WITH VERDICT.—Where a declaration alleged that plaintiff fell from a cable car while attempting to board it, and that the car was suddenly started, causing the injury complained of, a special finding of the jury that plaintiff fell from the car while it was in motion, is inconsistent with the general verdict that when plaintiff fell the car was stationary, and a ruling entering judgment for defendant on the special finding was correct.

APPEAL by plaintiff from judgment entered for defendant affirmed in the Appellate Court, First District.

D. C. KELLEHER, for appellant.

W. J. HYNES and H. H. MARTIN, for appellee.

The declaration alleged that on November 10, 1892, the appellee was operating a street railway and cable-car system, and grip cars with trailers, in Chicago, on State street, and that south of Congress street, on State street, appellant became a passenger upon a grip car, and trailers attached thereto, upon defendant's road; that, "when said car was stopped and was not moving," appellant "alighted upon said grip car, and with all due care and diligence was seeking a seat;" that "while plaintiff was seeking a seat, and while said car was stationary and not moving," a team of horses and a wagon collided with appellant, and threw him from the grip car to the ground; that appellee, through its agents and servants, had full knowledge of the fact that appellant had been knocked from said grip car, and was then and there upon the ground and by the side of said grip car, endeavoring to protect himself against being

1. Affirming 61 Ill. App. 265.

injured and against being run over by said grip car and trailers; that it was the duty of the appellee to stop the said grip car, and trailing cars attached thereto, a reasonable time to enable said plaintiff to arise from the ground in safety, but that the said appellee, having notice through its agents and servants of appellant's situation, by its said servants negligently and carelessly caused the said grip car, and trailers attached thereto, to be suddenly and violently started and moved onward and southward, and thereby the plaintiff was run over by the said grip car, and trailers attached thereto, and one of his hands was run over and crushed and maimed; and that, to save appellant's life, it was necessary to amputate some of the fingers of his hand, and the same were amputated. The defendant filed a plea of general issue. The cause was tried before a jury, who returned the following verdict: "We, the jury, find the defendant guilty, and assess the plaintiff's damages at the sum of \$1,200." The jury also made the following special findings, in answer to the following questions submitted to them, to wit: "1. Did the driver of the defendant's car know that the plaintiff was lying upon the ground at the time he started up his car? A. No. 2. At the time the plaintiff fell, was the grip car in motion? A. Yes." Judgment was entered upon the special findings in favor of defendant and against plaintiff, to which judgment and ruling plaintiff duly excepted. An appeal was taken to the Appellate Court, which affirmed the judgment of the Circuit Court.

The special finding made by the jury was inconsistent with the general verdict, as by it the jury found that the grip car was in motion at the time plaintiff fell from the same, when the declaration distinctly alleged that the car "was stopped and was not moving" when plaintiff boarded it and attempted to find a seat, and that he was thrown from the grip car "while said car was stationary and not moving." The general verdict found defendant guilty of the negligence charged in the declaration, namely, that it started suddenly into motion a car which "was stationary and not moving." A general verdict will not be set aside by the special finding unless the inconsistency between the two is so clear that the special finding necessarily controls the general verdict; but in the present case the fact that the car was stationary and not moving is a material part of the allegation of negligence. It necessarily follows that the special finding that the car was in motion when plaintiff fell therefrom is inconsistent with the general verdict which found defendant guilty of suddenly starting a car which was stationary.

Judgment affirmed.

Opinion by MAGRUDER, CH. J.

**NATIONAL LINSEED OIL COMPANY v. Mc-
BLAIN (1).**

Supreme Court, Illinois, January, 1897.

DEFECTIVE APPLIANCE—MASTER AND SERVANT.—Where an employee was injured by reason of being furnished with a defective oil can while cleaning machinery, there was evidence as to defective appliance where it was shown that plaintiff notified an official as to the same, who promised to furnish a proper can for the purpose.

APPEAL by defendant from judgment affirmed in favor of plaintiff in the Appellate Court, First District.

GURLEY & WOOD, for appellant.

T. W. BENNETT and C. M. HARDY, for appellee.

Action brought by Daniel McBlain against the National Linseed Oil Company to recover for a personal injury received in their employ while oiling certain machinery. On the trial plaintiff recovered \$5,000, of which he remitted \$2,500, and judgment was entered for \$2,500. The Appellate Court affirmed the judgment. Plaintiff's declaration alleged that defendant was in possession and using and operating a certain plant and linseed oil mill, with machinery for manufacture of linseed oil, etc.; that plaintiff was then and there in the employ of defendant as a general workman, and by and under direction of defendant was put to work at the very dangerous and hazardous employment of oiling certain gearing, shafting, and machinery of defendant, used by it in the manufacture of linseed oil; that it was the duty of defendant to furnish and provide plaintiff with an oil can or oiler with which to oil said gearing, shafting, and machinery, that was reasonably safe for that purpose, so that plaintiff's person might not needlessly or unnecessarily be exposed to danger or injury to life or limb while engaged in said work; that defendant, not regarding its duty in that behalf, wrongfully, etc., failed to furnish or provide plaintiff with an oil can or oiler that was reasonably safe to be used for that purpose; that plaintiff requested defendant to supply him with an oil can or oiler which would be reasonably safe for plaintiff to use in doing said work, viz., an oil can or oiler with a long, crooked spout, and with a handle to it, and that defendant promised to furnish plaintiff with such an oil can or oiler within a reasonable time, and ordered him

to proceed with the oiling of said gearing, shafting, or machinery with said defective oil can or oiler which plaintiff then had in use; that defendant negligently, etc., failed to keep its promise in that regard, and did not furnish plaintiff with an oil can or oiler reasonably safe for him to use for that purpose; that plaintiff relied upon the promise of defendant to furnish him, etc., and under orders from defendant directing him so to do, proceeded to oil said gearing, shafting, and machinery with said defective oil can so furnished him as aforesaid, and, while relying upon said promise, plaintiff, by reason of the promise, and while engaged in oiling with said defective oil can which defendant had furnished him for that purpose, and while plaintiff was using all due care, became and was caught by and drawn into said gearing and machinery, and plaintiff's right hand was caught and drawn into said gearing and machinery, and was thereby crushed, mangled, and severely injured.

In October, 1892, the superintendent in charge of the mill directed appellee to oil certain shafting in the mill each evening. A short time thereafter he was relieved of that duty, but in November, 1892, he was directed to resume that service, which he did, and continued oiling the shafting until the 18th of January, 1893, when, in the discharge of his duty, he received the injury complained of. It was contended on the argument that there was no evidence proving or tending to prove that the oil can in use by appellee at the time he was injured was defective. It was alleged on the declaration that it was the duty of the defendant to furnish plaintiff with an oil can, to oil the gearing and shafting and machinery, that was reasonably safe for that purpose, and that the defendant failed in that regard. It may be conceded that this was a material averment, and, if there was no proof whatever in the record to sustain it, the instruction to find for the defendant should have been given. But upon an examination of the record there was evidence tending to establish the averment of the declaration, plaintiff having testified to the facts. In addition he also testified that on several occasions he called on the superintendent for a different can from the one he had been furnished, and the superintendent promised to furnish a can. When the plaintiff called on the superintendent and showed him the can, and said it was not a proper can, and the superintendent promised to furnish another, he, in effect, admitted that the can furnished was not suitable; at all events, the evidence clearly tended to prove the allegation of the declaration.

Judgment affirmed.

Opinion by CRAIG, J.

SWIFT & CO. v. MADDEN (1).

Supreme Court, Illinois, January, 1897.

DEFECTIVE MACHINERY — NOTICE — MASTER AND SERVANT.—

Where an employee was injured by defective machinery, the fact that he continued, after giving notice to his employers of the danger, to work for a time in order to enable repairs to be made, although no definite promise was given as to when repairs should be executed, is not evidence of negligence on the employee's part.

APPEAL from judgment rendered for plaintiff which was affirmed by the Appellate Court, First District.

J. B. BRADY and J. A. POST, for appellant.

F. S. MURPHY, for appellee.

Action by Peter Madden against Swift & Co., a corporation in Chicago, engaged in a slaughtering and packing business, to recover damages resulting from a personal injury received while in the service of the company. The first declaration filed by the plaintiff consisted of one count, to which the defendant filed a general demurrer. The demurrer was confessed, and on November 28, 1892, plaintiff filed an amended declaration, which contained, in substance, the following allegations: That the defendant, on, to wit, the 7th of June, 1892, etc., engaged in the manufacture of a substance called "glue," and, while so engaged, "employed the plaintiff to shove or move certain buckets from one part of said factory or shop to other parts thereof, for the purpose of carrying articles used in the manufacture of said substance. The plaintiff avers that each of said buckets was hung on a hook attached to a pulley or bolt of iron, which pulley or bolt of iron was attached, at the other and upper end, to two wheels, which ran upon certain rails or lines of railway," etc.; "that he was employed by defendant to move said buckets from one part of said factory to another, and thereby it then and there became the duty of defendant to have kept the said line or lines of railway and switches in a good and safe condition of repair, that the plaintiff might safely work at his said employment of moving the said buckets." "The defendant did not regard its duty in that behalf, nor use due care or diligence in that behalf, but, on the contrary thereof, negligently and wrongfully permitted and allowed said switches in said factory, etc., to be and remain in an unsafe and dangerous condition; so that the plaintiff, while so employed by defendant, in shoving and moving said buckets from

1. Affirming 63 Ill. App. 341.

one part of said factory or building to another part thereof, with all due care and diligence on his part, turned a certain switch to move said bucket in the direction in which he was ordered to go with said bucket, on the day aforesaid, in said factory or building, etc. Said switch being in an unsafe and dangerous condition for want of repair, which fact was not known to the plaintiff, did not remain in the position in which plaintiff had properly placed it, so as to allow said bucket on said rail or line of railway to move in the direction intended, but said switch closed and sprung back as plaintiff moved the bucket to turn the same upon said switch." To the declaration, the defendant filed a plea of not guilty, upon which issue was taken on December 24, 1892. After the cause was thus at issue, no further steps were taken until June 23, 1894, when the plaintiff asked and obtained leave of court to file two additional counts. The first additional count contained, in substance, the following allegations: "It then and there became the duty of the defendant, whenever the lines of railway so became broken or out of repair, and dangerous and unsafe, to repair the same, that plaintiff might safely work at his said employment; yet the defendant, although notified that the lines of railway and switches were out of repair and unsafe, and although it promised that the lines of railway and switches should be at once repaired, and thereby caused the plaintiff to continue in his said employment, did not regard its duty in that, and carelessly and negligently permitted said lines of railway and switches to be and remain out of repair, and in an unsafe and dangerous condition," etc. The second additional count alleges substantially as follows: "The defendant, well knowing that a certain switch was out of repair, and unsafe and dangerous, on, to wit, said date, June 7, 1892, carelessly and negligently ordered the plaintiff to move a certain bucket from one part of the factory to another, and over and across said switch, which was then and there out of repair and unsafe and dangerous, by means whereof the plaintiff, while so employed by defendant in moving and shoving said buckets from one part of the factory to another part thereof, over and across said switch, with all due care and diligence on his part, to wit, on the day aforesaid, moved said bucket in the direction he was ordered to go with it, which said switch did not remain in the position in which plaintiff had properly placed it, so as to allow said bucket to move in the direction intended, but said switch closed and sprung back as the plaintiff moved the bucket upon the switch." To the first additional count of plaintiff's declaration, defendant pleaded the statute of limitations. The plaintiff demurred to the plea, and the court sustained the demurrer.

Defendant excepted to the decision of the court, and elected to stand by the plea. Issue was taken on other pleas, and a trial was had before a jury, which resulted in a judgment for plaintiff, which, on appeal, was affirmed in the Appellate Court.

It is claimed that the court erred in refusing the following instruction: "The court further instructs the jury, as a matter of law, that if they believe from the evidence that the machinery in question was out of order, and that such fact was known to the plaintiff, and that the plaintiff called the attention of the defendant to such fact, and if the jury further believe from the evidence that the foreman in charge of the plaintiff promised to have said machinery repaired, without fixing a time when the same should be repaired, and that said promise was indefinite as to when the same should be repaired, and that the plaintiff continued to work upon said machinery from day to day with the knowledge that the repairs were not made, then the court instructs the jury, as a matter of law, that the plaintiff assumed the risk of working thereon, and that he cannot recover in this case, and that the jury should find the defendant not guilty." It was not necessary that the foreman should fix a definite time when the repairs should be made to enable plaintiff to recover for an injury received while engaged in the service of the defendant after the notice was given. When the notice was given, the foreman promised to see that the repairs should be made. This was, in effect, a promise to repair in a reasonable time; and the plaintiff could remain in the service of the defendant a reasonable time to prevent the fulfillment of the promise without being guilty of negligence. The rule on this question is well stated by *Furnace Co. v. Abend*, 107 Ill. 51. It is there said: "It is now uniformly stated by text writers that where the master, on being notified by the servant of defects that render the service he is engaged to perform more hazardous, expressly promises to make the needed repairs, the servant may continue in the employment a reasonable time to permit the performance of a promise in that regard, without being guilty of negligence; and, if any injury results therefrom, he may recover, unless when the danger is so imminent that no prudent person would undertake to perform the service." We do not think the instruction contained a correct statement of law, and it was therefore properly refused.

It is also claimed that there was a variance between the pleadings and evidence; that it was alleged in the declaration that defendant promised that the switches and appliances should be at once repaired, while the evidence was that the appliances would be fixed without specifying the time. If the defendant desired to take

advantage of the variance between the declaration and the evidence, it was his duty to object to the evidence when offered, and state the nature and character of his objection, so that plaintiff might, if he desired, ask leave to amend the declaration. But this course was not pursued. No objection on the ground of variance was made when the evidence was offered. The objection not having been made at the time the evidence was offered, it must be regarded as waived, and the question of variance cannot be raised on appeal.

Judgment affirmed.

Opinion by CRAIG, J.

WABASH PAPER COMPANY v. WEBB.

Supreme Court, Indiana, December, 1896.

MASTER AND SERVANT — INJURED BY BEING CAUGHT BY MACHINERY WHILE ATTEMPTING TO STEP OVER SHAFT.—Where an employee, after working around machinery and oiling it for three weeks, attempted to step over a revolving shaft upon which was an oil cup and set screw, which compelled him to step fourteen inches high and about three feet long, and was injured, and he might have used either of two passage ways which were comparatively safe, he was guilty of negligence, although he testified that he was not aware of the presence of the cup or screw. Where usual and ordinary care was used by an employer in the maintenance of machinery, it was not negligence to fail to have the gearings and revolving shafts boxed.

APPEAL from judgment of Circuit Court of Grant county, in favor of plaintiff.

O. H. BOGUE, W. G. SAYRE and BROWNLEE and PAULUS, for appellant.

A. E. STEELE, ALVAH TAYLOR and H. C. PETTIT, for appellee.

Plaintiff was employed in the paper mill of defendant, where he had been engaged for a year and nine months, and in the room where he was hurt for three weeks previous thereto. The room was well lighted by electricity. The plaintiff was called to assist in guiding some paper to the cutter, and after the paper was caught he attempted to pass out from the space where he had been assisting to the front of the machine. This was usually done by stooping and passing under the running paper and by the open space between the machines. One could also reach the front by passing out to the east and around north by the cutter. To go this way appellee had to first pass through a ten-inch space between a pulley on the north

and a shaft support on the south. He would then be in a small square with shafting and other machinery on every side. Out of this square the exit that seems to have been provided by appellant was to the south-east between two stands or supports at right angles to each other, on the one of which rested the end of the "reel" shaft and on the other the end of the shaft that turned the "cutter." This space was nineteen inches in width. The cutter shaft was connected at its north end at right angles by fourteen-inch gearing with the shaft which directly operated the cutter. Near to the gearing on a "friction clutch" over the cutter shaft was an oil cup, and about one-fourth of the way around the clutch from the oil cup was a set screw to hold the clutch close to the shaft. When the machinery was in motion the cutter shaft made from 65 to 100 revolutions in a minute. The evidence is in conflict as to whether the oil cup and set screw could be seen when the shaft was revolving. The cup and screw each projected from the clutch about an inch and three-quarters. Appellee, when passing out to go around to the front, did not return west under the running paper, but went east. He did not, however, go out by the exit to the south-east. He says the floor was slippery with oil. He started to go out across the cutter shaft near the clutch and gearing, and then he fell over, his left leg striking between the gearings by which it was crushed and torn. The shaft and clutch over which he attempted to step were about fourteen inches high, and to get over one "would have to step about fourteen or fifteen inches high and maybe between two and one-half and three feet in length." He testified that his clothing was caught by the oil cup and set screw and that he did not know they were there, as they could not be seen when the shaft was revolving and it was always revolving whenever he saw it. He had often passed under the paper and out by the other way. The reason he did not pass under the paper this time was because it had sagged to the floor. It appears, however, that it could have been raised by the hand, and this was the usual way. Held, that the way chosen was a dangerous one, and he was not justified in taking the hazardous route when by lifting the paper he could have safely passed under it, or by waiting a moment the sag would have been taken up by the machine, to say nothing of going by the nineteen-inch passage. But, granting all that the appellee contends for: oily floor, sagged paper and want of knowledge of set screw and oil cup, he has not shown himself free from negligence. If he did not know of or see the cup and screw after working about this particular machinery for three weeks, he ought to have seen them and known of them. *Railroad Co. v. Stick*, 143 Ind. 449.

The evidence showed, and the jury find, that the machinery was constructed and maintained after approved plans and although the gearings and exposed parts might be rendered more safe by being boxed, it is all that can be asked. Extraordinary care cannot be demanded, and the usual and ordinary risks attendant upon work about machinery are hazards of the service which are assumed by the employee.

Judgment reversed.

Opinion by HOWARD, J.

RICHMOND GAS COMPANY v. BAKER.

Supreme Court, Indiana, January, 1897.

EXPLOSION — DEFECTIVE GAS PIPE.— A gas company which fails to repair a defective pipe after repeated requests to do so, and an explosion occurs and injures one of its customers, is liable for injuries resulting from its negligence.

INJURED BY EXPLOSION — GAS COMPANY LIABLE.— In such case a person remaining in the house on assurances that the pipes are safe, and is injured by the explosion, is not guilty of contributory negligence.

DAMAGES.—An instruction which, in effect, tells the jury they may consider the shortening of plaintiff's expectancy of life as an element of damages is erroneous and judgment for plaintiff was reversed.

APPEAL from judgment rendered for plaintiff in the Circuit Court, Wayne county.

THOMAS J. STUDY, for appellant.

JACKSON & STARR, for appellee.

This was an action for damages, brought by appellee, for injuries alleged to have been received by her by reason of an explosion of artificial gas, caused by the negligence of appellant. The questions arising on the appeal relate chiefly to the allegations and proof made as to negligence on the part of the company, and contributory negligence on the part of the appellee. With their general verdict, the jury returned answers to interrogatories submitted to them, and from these answers, as also from the evidence, it appears: That the appellee is an aged woman, living in the family of her grandson, Thomas Crabb; and that on December 18, 1892, the appellant began to furnish gas to the house of Mr. Crabb, having entered into a contract with him for that purpose. The gas was received by a pipe passing through the outer wall of the cellar, in which a meter was placed by the company. Mr. Crabb's family consisted of himself,

his wife, their child, and the appellee. He was engaged in daily work away from home, and his wife conducted a small store on the ground floor, and in the front part of the house. The house had already been properly piped for gas by Mr. Crabb, who had also extended a pipe into the cellar, ready to be attached by the company to its gas main in the street, and the company did so attach the house pipe to its main by a connecting pipe. A short time after the attachments were so made, and the gas began to be furnished, it was noticed by the family that gas was escaping into the store and other rooms of the house. Before notifying appellant of the leak, a man was sent into the cellar to examine the pipe, and he found that the gas was leaking through a part of the pipe put in by the company, consisting of a cracked elbow attached to the house pipe. The leak was temporarily closed by candle grease. Very soon, however, the gas again began to escape, and to permeate the house, and notice was sent to the gas company to repair the leak. In response to this request, the company sent an employee named Brannon, who applied what is known as "plumber's cement" to the cracked elbow, and thus, for the time, stopped the flow of gas. The jury find that Brannon did not know how to apply the cement properly, and soon after his work the gas again began to escape. The explosion occurred on Wednesday evening, January 18, 1893,—just one month after the gas had been introduced into the house. On the Sunday morning preceding, the gas was noticed in dangerous quantities; and Mr. Crabb shut it off from the street, to stop the flow into the house. On Monday afternoon he again turned on the gas. At the time when the house pipes were attached to the street mains to supply the house with gas, the company placed an appliance, being a stopcock, with a wrench ready for use, between the wall of the building and the meter, for the purpose of cutting off the gas whenever it should be desired to do so. The manner of using this appliance was at the time pointed out to Mr. Crabb, and he understood it, and had no trouble in shutting off the gas on Sunday morning, and turning it on again on Monday afternoon. When the gas was so shut off at the stopcock, the flow from the mains ceased entirely, and there was no escape of gas into the house. After the gas was turned on by Mr. Crabb on Monday afternoon, it soon began to escape again into the rooms, and notice was again sent to the company that afternoon to come and repair the pipe. On the next afternoon, being the day before the explosion, the company sent the same employee, Brannon, to attend to the leak. After such examination and repair as he made, he turned on the gas, and informed Mrs. Crabb that it was now all right; and it appears that

on the same evening this information was communicated by her to appellee. The gas, however, still continued to escape from the cracked elbow into the house, and in greater quantities, until the evening of the next day, when it exploded. The appellee had lived for some time with her grandson, and as a member of his family. She had been there continuously during the month, from the day when the gas was admitted into the house until it exploded and wrecked the house, on the day of her injury. During all the time that there had been the smell of escaping gas, she had been in and about all the rooms of the house, and had ample opportunity of detecting the odor. Except that her hearing was not good, she had the full use of all her faculties and her senses, including the sense of smell, and was a person of ordinary intelligence and understanding. During the day of the explosion, and the days immediately prior thereto, the odor of escaping gas was plainly discernible in all parts of the house, and Mr. Crabb and his wife were told by persons visiting them that the gas then escaping into the house was dangerous. At the same time the appellee was in daily communication with Mr. and Mrs. Crabb, and was in and about all the rooms of the house, including the store, in which the explosion took place. The jury further find that on the day of the explosion, and on the Sunday, Monday, and Tuesday preceding, the odor of gas was plainly discernible to any one using ordinary diligence. The cellar did not extend under the store-room, but there was a shallow place thereunder, between the ground and the floor, separated from the cellar by a wall. Through this wall there was an aperture by which the gas escaping from the cracked elbow entered into the space beneath the floor of the store-room, and thence penetrated above. At one end of the store was a closet, and into this the gas was collected in an excessive amount, and from this point the explosion originated. Mrs. Crabb had sold a cigar to a customer, and gave him a match to light it. The appellee was at the time present with Mrs. Crabb. The customer stood close to the closet when he struck the match, and immediately the gas took fire and exploded. Appellant contends that the facts found by the jury, and shown in the evidence, disclose contributory negligence on the part of the appellee, or, at least, that she has not established her freedom from such contributory negligence. In this view, however, the court did not agree. Because the gas had penetrated the various parts of the house in dangerous quantities, it does not follow that the occupants were aware of the full extent of their danger. They had good reason to rely upon the superior knowledge of the gas company, and of its agents who had made the connections of its mains with the house, and who

had afterwards assumed charge of making repair of the connecting pipes, and then assured the family that all was now safe, and that they need not be alarmed about the odor, which they were assured came from the gas-post on the street corner. The company could not thus lull the members of the family into a belief in their security, and then, when injury came, turn on the family, and charge them with negligence in relying on the assurance of safety so given by the company itself. The company had assumed the responsibility of making the repairs or changes in the piping necessary for the safe delivery of gas to the house, and thereafter continued to deliver the gas with full knowledge of all the conditions, including a knowledge of the family's reliance upon its assurance of safety.

An instruction upon damages cannot be upheld on the ground that it was intended simply to draw the attention of the jury to the probable shortening of life as an indication of the severity of the injury, and consequently of present and future pain, as it may be answered that the instruction was evidently drawn with no such purpose in mind, but merely with the view of authorizing the jury to consider the shortening of her life as an element which of itself, simply, might be taken into account by them in awarding her damages in case they should find in her favor. This, however, was unauthorized. The instruction, at best, was misleading. Neither can it be said, from the evidence and the answers to interrogatories, that this instruction was harmless, or that it might not have unduly influenced the verdict of \$4,600 in appellee's favor. Without saying that such damages were excessive for a person 85 years of age, and injured only to the degree shown, the court was unable to know whether the jury would have awarded damages to that amount had they not considered the shortening of appellee's expectancy of life as a legitimate element in making their award.

Judgment reversed, with instructions to grant a new trial.

Opinion by HOWARD, J.

STALCUP v. LOUISVILLE, NEW ALBANY AND CHICAGO RAILWAY COMPANY.

Appellate Court, Indiana, January, 1897.

WHEN NOT A PASSENGER.—The fact that a person was on a train "by the invitation and permission of the conductor" thereof does not entitle him to recover damages as a passenger, as such invitation did not constitute him a passenger.

WHEN NOT A SERVANT — WHEN RAILWAY COMPANY NOT LIABLE.—

Neither does the fact that such person performed services on the train as a brakeman, with the consent and invitation of servants of the railway company, constitute him a servant of the company nor entitle him to recover damages for injuries resulting from the train falling through a bridge, due to alleged negligence of defendant company.

APPEAL by plaintiff from judgment rendered for defendant in Circuit Court, Greene county. The facts appear in the opinion.

WM. S. SLINKARD, for appellant.

E. C. FIELD, W. S. KINMAN, and DAVIS & MOFFETT, for appellee.

WILEY, J. The appellant, being a minor, brought this action by his next friend, to recover damages alleged to have been sustained while riding on appellant's railroad. The complaint is in two paragraphs, to each of which the appellee addressed a demurrer, which was sustained by the trial court, and an exception reversed. The appellant refusing to plead over, the court rendered judgment for appellee for its costs, and the appellant appealed. The error assigned is the sustaining of the demurrer to each paragraph of the complaint.

The first paragraph of the complaint avers that the appellee was the owner and operating a line of railroad from Bedford, Ind., to Swiss City, Ind., passing through the town of Bloomfield, and engaged in carrying passengers and freight on what was known and designated a "mixed train;" that a part of the line of said road was a bridge over White river, about forty feet high, and 300 feet long; that on the 4th day of June, 1893, and for a long time prior thereto, the "plaintiff, by invitation and permission of the conductor and all others in control of said train, and with full knowledge and consent of all persons conducting the management of said train, was riding on said train, and for more than two years before said time, between said point, had been riding on said train for the purpose of being carried from said town of Bloomfield to said town of Swiss City, by said defendant; that said bridge, on said day, was composed of three spans; that the middle span was on said day rotten, decayed, weak, old, dangerous and unsafe; that defendant on said day, and for more than six months prior thereto, had full knowledge of said condition of said span, and recklessly, negligently, and wantonly refused, neglected, and failed to make the same safe and secure; * * * that on said day, while riding on said train, said span of said bridge, without any fault or negligence on the part of the plaintiff, but wholly through the fault, negligence, recklessness, and wantonness of the defendant, gave way, broke,

and tumbled into said White river, and the train and car on which plaintiff was riding was thrown and fell into said river, a distance of forty feet, whereby he was seriously injured," etc. It is strongly urged by counsel for appellant, in their very able brief, that each paragraph of the complaint is sufficient, and that the court erred in sustaining the demurrer thereto. From the parts of the complaint quoted in this opinion, it is apparent that the first paragraph proceeds upon the theory that the plaintiff was upon the defendant's train, at the time of the accident, by the invitation, permission, and consent of the conductor, who was in charge of it; that the plaintiff was without fault or negligence; and that the defendant is liable to respond in damages by reason of such facts. As it is averred that plaintiff was on defendant's train by the invitation of the conductor, to be carried from Bloomfield to Swiss City, in the absence of any contrary allegation, it is to be presumed he was being carried free of charge. Do these facts constitute the relation of passenger and carrier? The answer to this inquiry will lead us to the solution of the question under consideration. The Supreme Court of Pennsylvania has given a very lucid definition of the term "passenger," as follows: "A 'passenger,' in the legal sense of the word, is one who travels in some public conveyance, by virtue of a contract, express or implied, with the carrier, as the payment of fare or that which is accepted as an equivalent therefor." *Bricker v. Railroad Co.*, 132 Pa. St. 1, 18 Atl. Rep. 983. "A passenger is a person whom a common carrier has contracted to carry from one place to another, and has, in the course of the performance of that contract, received under his care, either upon the means of conveyance, or at the point of departure of that means of conveyance." 2 Am. & Eng. Ency. Law, p. 742; *Railroad Co. v. Price*, 96 Pa. St. 256. It is clear, therefore, from these authorities, that the facts stated in the first paragraph of the complaint do not show that the appellant was a "passenger" in the legal meaning of that term, on defendant's train. As averred in this paragraph, the appellant was upon the train "by the invitation and permission of the conductor." The general rule is that conductors and other employees in charge of a train are not clothed with authority to invite persons to take passage with them as their guests, and especially is this true of conductors and employees of freight trains. In New York it has been held that "the servants of the railway in charge of such trains have no implied authority to invite strangers to become passengers thereon, and, in the absence of proof of express authority vested in the conductor, the acceptance of his invitation to ride thereon does not make a stranger a passenger." *Eaton v. Railroad Co.*, 57 N. Y. 382;

Waterbury v. Railroad Co., 17 Fed. Rep. 671; *Dunn v. Railway Co.*, 58 Me. 187. The complaint in the case now under consideration avers, in the first paragraph, that appellant was on defendant's train by the "invitation and permission" of the conductor. It is not averred that the conductor was empowered with the authority either to invite or permit the appellant to become a passenger, or to ride upon the train, under the facts charged. In the absence of such allegation, no presumption can be indulged that the conductor or other employees connected with the train were authorized to extend to appellant such invitation. It is the settled rule in this State that, before there can be any liability on account of negligence in cases of this character, it must appear that the party complained of was under some legal duty or obligation to the person injured. *City of Indianapolis v. Emmelman*, 108 Ind. 530, 9 N. E. 155; *Penso v. McCormick*, 125 Ind. 116, 25 N. E. Rep. 156; *Thiele v. McManus*, 3 Ind. 132, 28 N. E. Rep. 327; *Carskaddon v. Mills*, 5 Ind. App. 22, 31 N. E. Rep. 559. Under the averments of the first paragraph of appellant's complaint, no such duty or obligation exists. Counsel for appellant, with other cases, cites the case of *Railway Co. v. Meadows*, 13 Ind. App. 160, 41 N. E. Rep. 398, in support of his contention that appellant was a passenger, and entitled to all the rights of a passenger, by reason of the invitation of the conductor. In that case, a girl ten years of age was invited by the driver of a street car, drawn by mules, to ride, and was injured while so riding, by the gross carelessness of the driver. And again, in that case, it was conceded by appellant that the child was rightfully upon the car, and hence it was held that the appellant owed her some protection.

The second paragraph of the complaint is couched in almost the same language as the first, except it seeks to aver that the plaintiff, at the time of the accident, was in the employment of the defendant. That part of the second paragraph of the complaint is as follows: "This plaintiff, on said day, and for more than two years prior thereto, was and had been working for said defendant, loading and unloading freight, assisting passengers on and off said train, setting and throwing brakes, and doing the general work of a brakeman. That said plaintiff, on said day, and for more than two years before said day, did and had performed said labor with the acquiescence, knowledge, consent, and permission of the conductor and all other persons conducting and running said train, and for more than two years before and on said day plaintiff had ridden and did ride on said train between said towns of Bloomfield and Swiss City, performing the work as aforesaid. * * * That on said day said plaintiff was on said train, in performance of said work and labor, and going

to the said town of Swiss City to perform similar work and labor for said defendant, when said span of said bridge gave way," etc. The averments of the second paragraph of the complaint are wholly insufficient to show that he was an employee of the defendant. He avers that he was then performing labor, and for more than two years prior thereto had been performing labor, with the "acquiescence, knowledge, consent, and permission of the conductor, and all other persons running and conducting said train." It is not charged that the conductor or other persons operating the train were authorized to employ the appellant to perform the labor in which he was engaged. No emergency or necessity is shown for the employment of appellant. Counsel for appellant concede that he could not maintain an action against appellee to recover for the services he had performed; and in this concession, we think, he tacitly admits the insufficiency of his second paragraph of complaint. The case, as made by the second paragraph of the complaint, is identical in principle to the case of *Cooper v. Railway Co.*, 136 Ind. 366, 36 N. E. Rep. 272. In the case just cited, appellant got on one of defendant's freight trains at the town of Poneto, under an arrangement with the conductor and brakeman, who had charge of the train, that he should assist the brakeman so far as he could, in consideration of being permitted to ride to Muncie. While switching at Montpelier, he was injured, by being thrown from the top of a freight car by the carelessness and negligence of the employees of appellee. The Supreme Court, in that case, by Howard, Ch. J., say: "While the conductor and brakeman were in charge of the train, it does not appear that they had any authority to employ assistance in its management. No emergency is shown for the employment of appellant. Neither was appellant a passenger; for, even if he had a right to ride upon a freight train, it does not appear that he paid or offered to pay his fare. No custom, rule or regulation of the appellee company is shown by which appellant might pay his way by working on the train, assisting the brakeman or other employee. There is no theory suggested by counsel, and the court can see none, according to which the complaint might be held good. At most, the appellant was upon the train by the sufferance of the conductor and brakeman, who were themselves without authority to so receive him. Any dangers to which he thus became exposed were wholly at his own risk." It is useless, under the case just cited, to pursue our inquiry further. As neither paragraph of the complaint stated a cause of action, the trial court properly sustained the demurrer.

Judgment affirmed.

PITTSBURGH, CINCINNATI, CHICAGO AND ST. LOUIS RAILWAY COMPANY v. COPE.

Appellate Court, Indiana, January, 1897.

BILL OF EXCEPTIONS—EVIDENCE—PRACTICE.—In order to have the longhand manuscript of evidence considered, it is imperative that the same should be filed in the clerk's office before it can be incorporated in the bill of exceptions. So *held*, on appeal, in an action to recover damages for alleged negligent destruction by fire of a sawmill.

APPEAL by the railway company from judgment rendered for plaintiff in the Circuit Court, Henry county.

JOHN L. RUPE and L. P. NEWBY, for appellant.

JOHN M. MORRIS and BROWN & BROWN, for appellee.

Appellee began this action against appellant to recover damages on account of the destruction of his sawmill by fire, which fire, it is alleged in the complaint, was caused by the negligent act of appellant. There was a trial of the issues joined, resulting in a verdict and judgment for plaintiff, over defendant's motion for a new trial. The errors complained of in the motion for a new trial are the admission of certain evidence, the giving and the refusal of the court to give certain instructions, and that the verdict was contrary to the law and the evidence. Counsel for appellee urged with much earnestness that the evidence was not in the record, and, as most of the questions presented for decision could not be decided without the evidence, that matter was first determined. It is imperative that the longhand manuscript of the evidence should have been filed in the clerk's office before it was incorporated in the bill of exceptions. Rev. Stat. 1894, sec. 1476; 2 R. S. 1881, sec. 1410; *De Hart v. Board*, 143 Ind. 363, 41 N. E. Rep. 825; *Marvin v. Sager*, (Ind. Sup.) 44 N. E. Rep. 310; *Rogers v. Eich* (Ind. Sup.) 45 N. E. Rep. 93; *Hamrick v. Loring*, Id. 107; *Manley v. Felty*, Id. 74; *Railroad Co. v. Wagner* (Ind. App.) Id. 76. The courts of this State have gone to the extent of holding that the record must affirmatively show that the longhand manuscript of the shorthand report of the evidence was filed in the clerk's office before the filing of the bill of exceptions, and not at the same time or as a part of the bill of exceptions. *Mamrick v. Loring*, *supra* (1).

1. In the recent case of *Carlson v. State* (Ind. Sup.) 44 N. E. Rep. 660, it was said: "It is settled by the decisions of this State that the filing of the long-

hand evidence must be antecedent to its being incorporated into a bill of exceptions by the signature of the judge to such bill."

The record in this cause, on page 19, shows that on August 6, 1895, appellant filed her bill of exceptions No. 1, and on page 53 the following entry occurs: "And at the same time comes the said defendant, and files herein her bill of exceptions No. 2, which is the record of all of the evidence given upon the trial of said cause, and the objections thereto, made and certified by A. D. Ogborn, the official reporter of the Henry Circuit Court, on the request of the said defendant, from the shorthand reports of said reporter, and the same being the longhand transcript of such evidence, made from such shorthand notes taken by said reporter during the trial of said cause, under oath; and the same, duly signed and certified by the judge of said court, as well as by said reporter, is now filed by the defendant as her bill of exceptions No. 2 of the evidence in this cause, to be attached to the transcript therein as a part of the record in this cause on appeal, as provided by statute in such cases, which is as follows: "Then follows the original longhand manuscript of the evidence, and following this the certificate of the trial judge, and following this the certificate of the clerk of Henry Circuit Court, which is as follows: "State of Indiana, Henry county—ss.: I, Charles L. Hernly, clerk of the Henry Circuit Court, do hereby certify that the foregoing transcript is a full, true, and complete copy of all the proceedings and order-book entries made, and all of the papers now on file in my office, and of the judgment of the court, and that the evidence embodied in the transcript is the identical, original, longhand manuscript of the evidence made by the official shorthand reporter, who was duly sworn according to law to report the evidence in said cause, as embodied in defendant's bill of exceptions No. 2. In witness whereof, I have hereunto set my hand and affixed the seal of the Henry Circuit Court at Newcastle, Indiana, this 21st day of August, A. D. 1895. Charles L. Hernly, Clerk Henry Circuit Court." It nowhere affirmatively appears that the longhand manuscript of the evidence was ever filed in the clerk's office before it was incorporated in the bill of exceptions. The certificate of the clerk does not recite that it was ever filed in his office except at the same time and as a part and parcel of the bill of exceptions. In fact, the record in the cause affirmatively shows that the longhand manuscript was filed by defendant (appellant) at the same time and as a part of her bill of exceptions. The evidence not being in the record, the admission or rejection of any part thereof complained of by appellant was not before the court; nor was the question whether the verdict is contrary to the law or the evidence presented.

Judgment affirmed.

Opinion by HENLEY, J.

LUHR V. MICHIGAN CENTRAL RAILWAY COMPANY.

Appellate Court, Indiana, January, 1897.

SPECIAL VERDICT IN NEGLIGENCE CASES — WHAT MUST BE FOUND.—In a special verdict, in actions based on negligence, the facts only, and not mere conclusions of law, should be found, and all the facts essential to a recovery stated. The statement that a certain act or omission was negligent, without stating the facts from which negligence could be drawn, is not sufficient to justify a judgment being rendered against defendant.

APPEAL by plaintiff from judgment for defendant rendered in Circuit Court, Porter county.

A. L. JONES, for appellant.

J. W. YOCHE and J. B. COLLINS, for appellee.

The question presented for consideration was the overruling of plaintiff's motion for judgment upon a special verdict which counsel contended sufficiently showed negligence on defendant's part to authorize judgment thereon for plaintiff.

It was stated in the verdict that, on April 5, 1893, the appellant was the owner in fee simple of certain lands described, through which the right of way and railroad of the appellee ran on a line about ten rods north of the south line of said land; that on said day there was standing on said land a grove of young growing timber of about six acres, which was north of and adjoining the right of way of the appellee; "that said six acres was of the value of \$60 per acre, and of the total value of \$360; that on said 5th day of April, 1893, a large amount of dry grass, weeds, leaves, rubbish, and other combustibles were on the right of way of the defendant, along and through plaintiff's said land, which dry grass, leaves, weeds, rubbish, and other combustibles the defendant carelessly and negligently suffered and permitted to gather, accumulate, be, and remain on its said right of way, through and adjoining the said land of the plaintiff; that on said 5th day of April, 1893, the defendant, by its agents and servants, was running and operating a train of freight cars along and on its said railroad, through and by the said land of the said plaintiff, which said train of cars was a way freight train, and was known as 'Train No. 52,' and was drawn and propelled by engine No. 39; that the defendant, by its agents and servants, so negligently operated and managed said engine as that large coals of fire were

carelessly and negligently dropped therefrom, and sparks of fire carelessly and negligently emitted therefrom, which said coals and sparks of fire, so being dropped by and emitted from said engine, the defendant carelessly and negligently suffered and permitted to fall among and set fire to the said dry grass, weeds, leaves, rubbish, and other combustibles, so negligently suffered and permitted to gather, accumulate, be, and remain upon the right of way of the defendant, and along its track, near and adjoining plaintiff's said land, as aforesaid; that the defendant carelessly and negligently suffered and permitted the fire so started to spread and escape from defendant's said right of way and onto plaintiff's said land, and to spread over and burn through said grove of young growing timber, thereby killing and destroying the trees and timber standing and growing on three acres of plaintiff's said land; * * * that said fire was started and spread, and said damage was done and caused, solely by and through the fault and negligence of the defendant, as hereinbefore found."

In a special verdict facts only should be found, and not mere conclusions of law. All the facts essential to a recovery must be stated. The verdict should contain the ultimate facts. If, in an action for negligence, such facts be stated in a special verdict that it can only be inferred from them that there was negligence, or that there was not negligence, the verdict need not state the inference of negligence or no negligence. In such case the court will determine, as a matter of law, from the facts so found, that there was or was not negligence. If, the facts being stated, reasonable men might candidly disagree as to the proper inference to be drawn therefrom concerning the existence or non-existence of negligence, the jury should draw the proper inference, and state it in the verdict. But whether the facts are such that the conclusion should be left to the court, or such that the jury should state the proper inference, the facts upon which the conclusion of the court is to be based, or from which the jury make the inference, should be stated in the verdict. The facts cannot be supplied by implication or intendment. *Railroad Co. v. Spencer*, 98 Ind. 186; *Railroad Co. v. Grames*, 136 Ind. 39, 34 N. E. Rep. 714; *Railroad Co. v. Hadley*, 12 Ind. App. 516, 40 N. E. Rep. 760. The statement in a special verdict that an act or omission was negligent will not vitiate the verdict, but it may add nothing that will increase its value to the party having the burden of the issue. In the verdict in question it did not appear, from facts set forth, that the presence of the combustible materials upon the right of way at the time specified was due to the appellee's negligence. No facts are stated upon which either the court or the

jury could properly base a conclusion that the appellee failed to perform its duty in the premises through want of due care and diligence.

Judgment affirmed.

Opinion by BLACK, J.

FAIRMOUNT UNION JOINT-STOCK AGRICULTURAL ASSOCIATION v. DOWNEY.

Supreme Court, Indiana, January, 1897.

FAILURE TO CLEAR TRACK FOR A HORSE RACE—LIABILITY FOR INJURY.—The fact that an association, under whose auspices a horse race was in progress, started a number of horses around the track while another horse was being driven in another direction, with the result that a collision took place, is negligence on the part of the association, and such negligence was the proximate cause of the injury.

DRIVING ON RACE TRACK—WHEN NOT CONTRIBUTORY NEGLIGENCE.—A person who drives a horse upon a track has a right to rely upon the association seeing that the track is clear before a horse race is started, and if such person is injured by reason of such neglect in the official's duty, he cannot be held to be guilty of contributory negligence.

APPEAL by defendant below from judgment in Superior Court, Madison county.

ST. JOHN & CHARLES and CHIPMAN, KELTNER & HENDEE, for appellant.

MOORE & COOPER and GOODYKOONTZ & BALLARD, for appellee.

The appellee (plaintiff below) recovered judgment for personal injuries sustained while driving upon a race track of the appellant (defendant below). Each paragraph of the complaint alleged that the appellant had advertised for, and invited participation in, certain races for prizes upon its race track during its fair season of 1894, under its control and direction; that the appellee had entered and his horse had been admitted by the appellant to participate in one of said races, to be held on a day named; that said race had been called by the appellant, and the various participants were upon the track; that the appellant carelessly and negligently started a number of the participants in said race without observing that one entitled to start was not with the number so started, but was going in the opposite direction from that in which the race was started, and occupying a portion of the track over which the horses so started in said race were to pass; that the horses so started by the appellant and the horse so going in the opposite direction met within sixty

feet of the starting point, the appellee's horse then traveling at a rapid pace, and the driver of one of the horses so started, that he might avoid a collision with the horse going in the opposite direction, suddenly swayed his horse to one side of such other horse, but in doing so made it inevitable that the appellee's horse should collide with his horse and sulky; that the appellee's horse did collide with the horse and sulky so swayed from its course, causing the injuries complained of. The complaint also alleged that the appellee was without fault or negligence in said occurrence, and it was alleged that "by reason of dust and other obstructions, which he is not able to name or state, he did not see said horse and sulky going in the opposite direction, nor the turning or breaking" of the horse with which his horse collided, "until a few seconds before the collision occurred, nor until it was too late" and "was impossible to prevent a collision." The complaint also alleged that appellant represented that said races would be conducted according to the rules of the National Association, which were that all horses to participate in any race should be driven to the right of the starter's stand, turned and speeded rapidly in the opposite direction when started in a race, and that no horse should be allowed upon the track excepting those engaged in the race. The appellee was not guilty of contributory negligence according to the facts. He had no equal opportunities with the appellant to foresee danger, as it was the duty of the appellant to conduct the racing upon its tracks according to the rules and to protect appellee from extraordinary dangers (1). It was not the starting of the horses which produced the injury; but starting the horses at a high rate of speed in one direction, while a horse and sulky were approaching from the opposite direction, when both must meet within a few feet of the starting point, that fact being actually or constructively known by appellant, was the natural and probable cause of the injury (2). The appellant owed a duty to appellee which it neglected to perform, and appellee, in consequence thereof, was injured without his fault.

Judgment affirmed.

Opinion by HACKNEY, J.

1. See also *Association v. Wilcox*, 4 Ind. App. 141, where it was decided, further, that negligence in failing to keep the track clear while horses are rightfully driven upon it, resulting in injury by collision, constitutes the proximate cause of such injury.

2. See also *Billman v. Railroad Co.* 76 Ind. 166; *Penn. Co. v. Congdon*, 134 Ind. 226; and as to those causes which are proximate and those which are remote, *Enochs v. Railway Co. (Ind.)* 44 N. E. Rep. 658.

**FISHER v. LOUISVILLE, NEW ALBANY AND
CHICAGO RAILWAY COMPANY.**

Supreme Court, Indiana, January, 1897.

ABSENCE FROM CONTRIBUTORY NEGLIGENCE MUST BE SHOWN.—

A recovery cannot be had for the death of an employee of defendant unless it is shown that his death was caused by the negligence of the defendant and without any negligence on deceased's part, or that he was wilfully killed by defendant.

EMPLOYEE KILLED ON RAILROAD—EVIDENCE.—Where a person was struck and killed by a train, a judgment for plaintiff would not be justified where there was no evidence as to what deceased was doing at the time of the accident, whether he was engaged in work or was looking at the train as it was approaching.

APPEAL by plaintiff from Circuit Court, Newtown county, from a judgment for defendant.

THOMPSON & BRO., for appellant.

E. C. FIELD, W. S. KINNAN, and CUMMINGS & DARROCH, for appellee.

Action by appellee to recover damages for the death of Benjamin Fisher, an employee of appellee, who was killed by one of appellee's trains, due to alleged negligence of appellee. The jury returned a special verdict upon which judgment was rendered in favor of appellee. The facts, as found by the special verdict, are substantially as follows:

On July 19, 1895, Benjamin F. Fisher was and had been in the service of appellee, as a section man, for about three months, and while in such service was struck and killed by a locomotive owned and operated by appellee, and which was attached to an extra freight train, not running on any schedule time, and following about one mile behind the regular local freight train, which had passed the decedent about five minutes before he was killed. That a high wind was blowing from the northwest to the southeast at the time. The deceased was killed about half way between the village of Surrey and the first public highway southeast of said village. The railroad crosses two public highways about one mile south of said village, one about eighty rods from the other. The track, for a distance of about three-quarters of a mile to the southeast of where the deceased was killed, was straight, and unobstructed in view from the cab of the locomotive as it approached the place where the decedent was killed.

Appellee's engineer and fireman could have seen decedent at work upon said railroad, in approaching him, for the distance of at least one-half a mile. The engineer in charge of the locomotive drawing the extra freight train did not give any signal at the highway crossing first south, and about one-half mile from where the decedent was at work, or give any warning as the train approached the decedent. The deceased would not have heard the whistle, if sounded at said highway crossing, but would have heard the danger signal as the extra freight train approached him from the southeast, if it had been sounded. The train was going at about twelve to fifteen miles per hour when the decedent was killed. The deceased was a man about forty-one years of age, with his eyesight good, and was in the full possession of his faculties. He could have seen the train approaching for about one mile if he had looked, and could have heard the noise of the approaching train in time to have avoided danger, if he had listened.

The special verdict stated that there was no evidence as to what the decedent was doing when he was killed — whether he looked or listened, or as to whether he saw and heard the train approaching in time to avoid it or not.

To entitle appellant to judgment in his favor upon the special verdict, it is essential that the facts found should show that the death of Fisher was caused by the negligence of the appellee, and without any fault on the part of said decedent, or that he was wilfully killed by the appellee. As the jury did not so find from the facts, appellant was not entitled to judgment upon the verdict (1).

Judgment for appellee (defendant below) upon the special verdict affirmed.

Opinion by MONKS, J.

1. Citing *O'Neal v. Railway Co.*, 132 Ind. 110; *Railroad Co. v. Bush*, 101 Ind. 582; *Railway Co. v. Barnhart*, 115 Ind. 399; *Cook v. McNaughton*, 128 Ind. 410; *Town of Freedom v. Norris*, 128 Ind. 377; *Railway Co. v. Miller*, 141 Ind. 533.

When any injury is wilfully inflicted, it is not necessary to prove that the

person injured was free from contributory negligence. *Brannen v. Road Co.*, 15 Ind. 115.

As to what constitutes a wilful injury, see *Brannen v. Road Co.*, 15 Ind. 115; *Penn. Co. v. Meyers*, 136 Ind. 242; *Parker v. Penn. Co.*, 134 Ind. 673; *Conner v. Citizens' Street R. R. Co.* (Ind.) 45 N. E. Rep. 662.

DEVINE v. CHICAGO, MILWAUKEE AND ST.
PAUL RAILWAY COMPANY.

Supreme Court, Iowa, January, 1897.

ALIGHTING FROM TRAIN—INSTRUCTIONS.—Where a person was injured while alighting from a train, instructions "that the defendant was guilty of negligence in stopping the train where it did, and in inviting and permitting passengers to leave the train, thereby causing plaintiff's injury," and that the jury might find defendant negligent if it failed to warn plaintiff that the train had not reached the station, and plaintiff could not discover that the car was not at the platform, and exercising ordinary care, attempted to leave the train, and by the starting of the train he was injured, were not contradictory as to the negligence charged.

APPEAL by defendant from verdict and judgment for plaintiff for \$650 rendered in District Court, Clinton county.

HAYES & SCHUYLER, for appellant.

R. B. WOLFE and MCCOY BROS., for appellee.

Action for personal injuries sustained by plaintiff while alighting from one of defendant's trains. The evidence showed that on the night of December 27, 1893—a dark, rainy night—plaintiff was a passenger on one of defendant's trains from Cedar Rapids to Lost Nation, he having a ticket for the trip; that on nearing Lost Nation, the brakeman called the station and opened the doors, and that plaintiff passed onto the car platform, and down the steps, for the purpose of alighting from the train; and that as he got off he fell (or was thrown) down, and was injured. The place at which he got off was some distance before the car had reached the depot platform. There was a dispute as to whether the train was stopped before reaching the depot platform, plaintiff's claim being that it was stopped, and that he was thrown down by the sudden starting of the train, while defendant contends that it was only slowed up, and was not stopped until the depot platform was reached, and that plaintiff was guilty of negligence in getting off when, where, and as he did. There were many assignments of error upon the rulings on evidence, on instructions and on defendant's motion for new trial. As to the evidence, but one assignment called for notice and that was as to the refusal of the court to admit questions on cross-examination which tended to disclose a conversation between a patient and a physician, which ruling of the court was correct. Defendant claimed that the instructions given were contradictory on the question of negligence and excepted to certain paragraphs. The first

paragraph stated it in the language of the petition: 'That the defendant was guilty of negligence in stopping the train where it did, and in inviting and permitting passengers to leave the train thereby causing plaintiff's injury. Another paragraph directed the jury that to find for plaintiff they must find that he was injured as alleged, that he was free from contributory negligence, and "that the alleged injury was caused by negligence on the part of the defendant, in calling out the station and stopping its train before it reached the station platform, and by starting up while the plaintiff was attempting to leave the train after said stop." Another stated, in substance, the facts of the case. The petition alleged as one of the circumstances that the train was suddenly started while he was getting therefrom. The instructions were not contradictory as to the negligence charged.

Judgment affirmed.

Opinion by GIVEN, J.

FOEDISCH v. CHICAGO AND NORTHWESTERN RAILWAY COMPANY.

Supreme Court, Iowa, January, 1897.

TOBACCO DAMAGED BY WATER — JURY — NEW TRIAL.— Where plaintiff sought to recover for injury to certain stock damaged by water in a cellar, but verdict was given in favor of defendant, a new trial will not be granted on the ground that on viewing the premises certain questions were asked by one of the jury who stated to plaintiff and his wife that things were not as stated by them, where it was not shown that there was prejudice on the part of the jurymen.

APPEAL from an order of the District Court, Pottawattamie county, sustaining plaintiff's motion to set aside the verdict rendered in favor of defendant, and granting a new trial.

HUBBARD & DAWLEY, for appellant.

FLICKINGER BROS., for appellee.

The action was to recover \$550 as damages caused by water to a stock of tobacco, cigars, and other articles stored in the cellar of plaintiff's residence in the city of Council Bluffs, Iowa. The charge is that the bridge of the defendant company across Indian Creek in Council Bluffs was so negligently constructed, that it did not furnish sufficient waterway, thereby causing said overflow. The evidence tended to show that the creek flowed in an artificial channel!

constructed many years ago by the city of Council Bluffs. On the night of June 2, 1890, an extraordinary rainfall occurred, and much rubbish, including planks and cordwood, was carried down the stream and against the bridge. The obstruction caused the water to break through the embankment, and spread over the flat, filling plaintiff's cellar. The jury found for defendant. Two days before the trial was concluded, the jury, with the consent of the parties, viewed the premises. After the verdict plaintiff filed an affidavit in support of a motion for a new trial, in which he stated that while the jury were viewing the premises one of the members asked certain questions of plaintiff and his wife and then told them that their statements did not agree with what they had testified to. There was no prejudice shown on the part of the jurymen nor did there appear any ground for presuming prejudice. A verdict will not be set aside merely because a juror has, in violation of his sworn duty, talked to persons about the case. It must appear that the misconduct was such as to materially affect the substantial rights of the complaining party. Even if the circumstance was prejudicial to plaintiff, he cannot avail himself of such because he failed to take steps to call the attention of the court to the alleged misconduct of the jurymen.

Motion for new trial not sustained and judgment below reversed.

Opinion by KINNE, CH. J.

ROBINSON v. CITY OF CEDAR RAPIDS.

Supreme Court, Iowa, January, 1897.

DEFECTIVE SIDEWALK—ICE AND SNOW—NEGLIGENCE FOR JURY.—

Where plaintiff was injured by reason of a defective sidewalk the question of contributory negligence is for the jury to determine from the facts.

APPEAL by defendant from judgment rendered for plaintiff in the District Court, Linn county.

WARREN HARMAN and J. J. POWELL, for appellant.

RICKEL & CROCKER, for appellee.

Plaintiff, while passing along the east side of Third street east in Cedar Rapids, at its intersection with the alley between First and Second avenues, on the night of March 10, 1894, fell and was injured. The accident was alleged to be due to defendant's negligence in not properly maintaining its streets, and plaintiff recovered judgment. Defendant insists that the evidence disclosed contributory negligence, and for that reason the case should have been taken

from the jury. There were but two witnesses to the occurrence, and they agree that the night was cold, dark and windy, and that there was some snow or frost in the air. The grocery store out of which plaintiff and another person came was next to the alley. The walk in front of the store was lighted from within, but the alley was so dark that neither could see. Plaintiff had lived in Cedar Rapids eight years, and during that time had worked a block and a half distant, but he testified that he did not remember ever having passed over this particular crossing before, and did not know its condition. He knew the walk was high above the grade. His friend was lame, and familiar with the place, and when he crossed it found it necessary to get down and feel his way. He could see the end of the sidewalk but not into the alley. Plaintiff had the right to rely upon the alley crossing being in a reasonably safe condition unless he knew otherwise. He was not bound to anticipate a drop at the end of the sidewalk of six inches and from there on a slanting apron in such a condition on one of the principal streets of the city. He was simply required to exercise that degree of care and caution a prudent person would ordinarily in passing along the streets of the city, and the question as to whether he did so was fairly and properly submitted to the jury.

Judgment affirmed.

Opinion by LADD, J.

HARDING v. CHICAGO, MILWAUKEE & ST. PAUL RAILROAD COMPANY.

Supreme Court, Iowa, January, 1897.

KILLING STOCK ON RAILROAD TRACK.—A railway company whose section hands closed a gate twice in one day is not liable for killing cattle that escaped upon the track through the gate that was left open afterwards by the owner of the land, although the section hands were in view of the gate at the time the owner passed through.

APPEAL from judgment of District Court, Chickasaw county, on verdict directed by court in favor of defendant at conclusion of evidence.

J. R. BANE, for appellant.

J. W. SANDUSKY, for appellee.

The evidence showed that the defendant's section men closed a gate that opened from one Donovan's land on to the track, twice in one day. After closing it the second time, the men stopped at a

culvert about fifty-five rods distant to repair it. They remained there a half hour and while there Donovan passed through the gate with a load of hay and left the gate open through which the plaintiff's cattle, which had escaped from his own land to Donovan's, passed and were killed by a train. *Held*, that the defendant was not liable.

Judgment affirmed.

Opinion by DEEMER, J.

HANSEN v. STATE BANK BUILDING COMPANY.

Supreme Court, Iowa, January, 1897.

INJURED WHILE OPERATING AN ELEVATOR.—One who attempted to operate an elevator in a building without the knowledge or consent of the owner, and was injured, cannot maintain an action against such owner.

APPEAL from judgment of District Court, Woodbury county, entered on verdict directed by court in favor of defendant at close of plaintiff's evidence.

WRIGHT & HUBBARD and LYNN & FOLEY, for appellant.

M. J. SWEELEY and LEWIS & BEARDSLEY, for appellee.

The evidence showed that the plaintiff, a boy eighteen years of age, was employed in one of the offices of a building that had two elevators, one of which was used for passengers and had regular attendants employed by the owner of the building, while the other had no attendants and was seldom used. On the day of the injury, the plaintiff entered the building and rang the bell for the regular elevator, and after waiting a short time, and it not appearing, he discovered the door of the other elevator ajar, but with no one in attendance. He stepped in and himself ran it to the third floor where he stopped it, and leaving the door partly open so he could use it to go down, he went into the office where he was employed, and came back, and as he stepped into the elevator it started up and he was carried nearly to the fourth floor, and was crowded out in some manner and fell some thirty-five feet or more to the bottom of the elevator pit and was injured. He had frequently used the elevator in the same way before, but without permission, and there was no evidence that the owner knew of such use. *Held*, that the plaintiff was guilty of contributory negligence and the owner was not liable.

Judgment affirmed.

Opinion by GRANGER, J.

**DALE v. ATCHISON, TOPEKA AND SANTA FE
RAILROAD COMPANY.**

Supreme Court, Kansas, January, 1897.

PENAL STATUTES.—Penal statutes have no extra-territorial force, and the courts of this State will not enforce the penal statutes of another State or territory.

PENAL STATUTE — PERSONAL INJURY — MASTER AND SERVANT.—

A statute of the territory of New Mexico provided that whenever any person should die from any injury occasioned by the negligence of an agent or servant managing any locomotive or train of cars the corporation in whose employ such agent or servant should be should "forfeit and pay for every person or passenger so dying the sum of \$5,000, which may be sued for and recovered first by the husband or wife of the deceased, or second, if there be no husband or wife, or if he or she fails to sue within six months after such death, then by the minor child or children of the deceased." In an action by the minor children of a person whose death was so caused and who left a widow surviving him, brought more than six months after the death, it was held that the courts will not enforce the liability created by the statute of New Mexico, it being in part penal and giving a right of action to persons other than the one who would be entitled to recover under the laws of this State in a similar case arising here.

FROM judgment of District Court, Wyandotte county, in favor of defendant, in action by Edwin Tom Dale and others against defendant, plaintiffs bring error.

FENLON & FENLON, for plaintiffs in error.

A. A. HURD and MILLS, SMITH & HOBBS, for defendant in error.

Edwin Tom Dale and two other minor children of Edwin Dale, deceased, brought this suit against the defendant to recover damages for the death of said Edwin Dale, which it is alleged was caused by the negligence of the defendant in the territory of New Mexico, on the 18th day of July, 1888. This action was commenced on July 31, 1890, and recovery is sought under a statute of New Mexico as stated in the syllabus. The petition alleged that no personal representative of the estate of said Edwin Dale had ever been appointed, and that although more than six months had elapsed after the death of said Edwin Dale no action had been brought by his widow to recover damages therefor, and that by reason thereof the cause of action given by said statute had vested in the plaintiffs. The only question necessary to decide is whether an action can be maintained in this State by the minor children under the statute of New Mexico. The theory of the law of the two States is different. In Kansas it

is strictly compensatory. In New Mexico it may be strictly penal, for it might happen that the person killed was a burden upon his family contributing nothing to them. It is elementary that penal statutes have no extra-territorial force. Story, Conflict Laws, sec. 621; *Lindsay v. Hill*, 22 Am. Rep. 564; *Bank v. Price*, 3 Am. Rep. 204. If we were to attempt the enforcement of the statute of New Mexico to the extent to which it is compensatory only, we should find ourselves in the position of having to resort to that statute to create the liability and then measure that liability by the principles obtaining in this State, for the law of New Mexico has but one fixed and rigid measure—the definite sum of \$5,000 in every case where liability exists; while in this State it is in all cases limited to the damages actually sustained by the party for whose benefit the action is prosecuted. Under the authorities the obstacles in the way of affording the plaintiffs any relief in this case appear insurmountable, and we feel constrained to hold that the courts of this State will not undertake the enforcement of a statute penal in part and so dissimilar in principle from the law of our own State(1).

Judgment affirmed.

Opinion by ALLEN, J.

1. The court cited many cases—*Hamilton v. Railroad Co.* 39 Kansas, 56, 18 Pac. 57, which was brought under a similar statute of Missouri, the courts of which State hold that the recovery must be of the full amount in the statute or nothing, and a verdict for \$2,500 was set aside. *Rafferty v. Railroad Co.* 15 Mo. App. 559. See, also, *Carroll v. Railway Co.*, 88 Mo. 239, which approved an instruction to assess the damages at \$5,000. *McCarthy v. Railroad Co.* 18 Kans. 46, denied the right of an administrator appointed in Kansas to recover for injuries received in Missouri. See, also, *Limekiller v. Railroad Co.*, 33 Kans. 83, 5 Pac. 401; *Vamter v. Railway Co.*, 84 Mo. 679. There is great diversity in the decisions of the courts as to whether an action of this kind may be brought in one State to recover under the statute of another State for a death

caused there. The following cases hold that such an action may be maintained where there is a similar statute in both States. *Dennick v. Railroad Co.*, 103 U. S. 11; *Leonard v. Navigation Co.*, 84 N. Y. 48; *Knight v. Railroad Co.*, 108 Pa. St. 250; *Burns v. Railroad Co.*, 113 Ind. 169, 15 N. E. 230; *Railroad Co. v. McMullin*, 117 Ind. 439; *Wooden v. Railroad Co.*, 126 N. Y. 10; *Davis v. Railroad Co.*, 143 Mass. 301. In *Herrick v. Railroad Co.*, 31 Minn. 11, 16 N. W. 413, it is held the action may be maintained, although there is no similar statute in Minnesota. The following hold no action can be maintained where the statutes are dissimilar. *Railway Co. v. McCormick*, 71 Texas, 660, 9 S. W. 540; *Ash v. Railroad Co.*, 72 Md. 144, 19 Atl. 643; *Marshall v. Railroad Co.*, 46 Fed. 269; *Adams v. Railroad Co.*, 30 Atl. 687.

CITY OF ELDORADO v. DRAPEERE.

Court of Appeals, Kansas, January, 1897.

DEFECTIVE SIDEWALK.—It cannot be said, as matter of law, that a patent defect in a sidewalk existing for eight days or more, and that caused a personal injury, did not constitute negligence on the part of the city, although the city had no actual notice.

FROM judgment for plaintiff of District Court, Butler county, in action by Francis Drapeere against defendant, defendant brings error.

B. R. LEYDIG, for plaintiff in error.

G. P. AIKMAN, for defendant in error.

Action by defendant in error for damages on account of injuries alleged to have been received through a defective sidewalk.

It was contended by counsel for plaintiff in error that the vital question in this case was whether a defect in a sidewalk of the character developed by the testimony, of which the city had no actual notice, was sufficient to constitute negligence on the part of the city and render it liable for injuries sustained by reason thereof. The special findings are not inconsistent with each other and are supported by the testimony; and we surely could not say, as a matter of law, that where a patent defect like the one shown to have existed in this case for eight days or more causes a personal injury, the corporation is not liable for the same. Nor does the fact that the evidence discloses that the defendant in error passed the defective portion of the sidewalk but a few hours prior to the accident in daylight conclusively establish contributory negligence. The question was for the jury.

Judgment affirmed.

Opinion by COLE, J.

**MISSOURI, KANSAS AND TEXAS RAILWAY
COMPANY v. LYCAN.**

Supreme Court, Kansas, January, 1897.

GROWING TREES ARE PART OF THE REALTY.—Trees growing on the land of the owner for fruit, shade or ornament are part of the realty, and a petition alleging injury to such trees by reason of defendant negligently permitting fire to escape from its locomotive alleges injury to the freehold

TREES DESTROYED BY FIRE BEING COMMUNICATED FROM GRASS ALONGSIDE TRACK—GENERAL VERDICT.—Where it is alleged that defendant was negligent in not providing its locomotive with a sufficient spark-arrester and in the manner of operating its engine, and also negligent in permitting tall grass, weeds, and other combustible material to remain on its right of way, a finding by the jury of negligence in not burning off the right of way, based on sufficient evidence showing that the fire started in and spread from such grass and weeds will support a general verdict for the plaintiff, notwithstanding findings in favor of the defendant on the other charges of negligence.

DAMAGES.—In such an action evidence as to the value of the trees while growing on the land, and as a part of it, is competent for the purpose of showing the amount of the plaintiff's damages.

DEFENDANT brings error from judgment of District Court, Crawford county, in action by Belle Lycan against defendant.

T. N. SEDGWICK, for plaintiff in error.

WELLS & WOOLLEY and J. D. MCCLEVERTY, for defendant in error.

Petition alleged ownership of a section of land and that on the 18th October, 1891, there were growing thereon valuable trees, shrubs, etc., the property of the plaintiff, and of the aggregate value of \$7,383, and that on said date the defendant ran a passenger train drawn by locomotive near the plaintiff's said land, and that said locomotive was not provided with sufficient safety screens or spark-arresters, and that defendant negligently, by reason thereof, permitted large flames and sparks of fire and live cinders to escape from said locomotive, and by reason of said defendant's negligence in the manner of operating its road the grass beside said line of railroad became and was ignited; and that defendant was negligent in permitting tall grass and weeds to grow and remain on the right of way of said railroad company, and in not providing sufficient spark-arresters, and that the grass and weeds became ignited by the sparks escaping from said locomotive, and the fire spread to plaintiff's premises and burned and destroyed the fruit trees and bushes hereinbefore set forth, to plaintiff's damage, \$7,383. The jury returned a general verdict in favor of plaintiff for \$2,140 damages and \$175 attorney's fees, and also made answers to special questions, among others specifying the values of the different trees destroyed; that the engine and safety screen and spark-arrester were examined by the engineer and found in good condition on the evening of Oct. 18, 1891, and on the morning of Oct. 19, 1891, and that the said locomotive was properly handled and managed by the engineer and his fireman; that the defendant did not burn off the right of way as it could have done, and that if it had been done the fire would not have

been communicated to plaintiff's land. That the fire was caused by the negligence of the defendant in not burning off the right of way. That said fire was not accidental.

We fail to perceive any essential fact omitted from the petition. A fruit tree, bush or vine, kept standing or growing for its fruit, or a shade or ornamental tree or bush, is a part of the realty, and presumably adds to the value of it. The trial court rightfully held that testimony concerning the value of the trees should be confined to their value to the farm and as a part of it.

Judgment affirmed.

Opinion by ALLEN, J.

LAWRENCE v. ATCHISON, TOPEKA AND SANTA FE RAILROAD COMPANY.

Supreme Court, Kansas, January, 1897.

COLLISION WITH TRAIN AT HIGHWAY CROSSING.—In case of a personal injury by a collision with a locomotive engine and train at a highway crossing, where the answers of the jury to particular questions of fact show contributory negligence on the part of the plaintiff, and the general verdict is for the defendant, and only a part of the evidence is preserved, and no material error appears in the instructions, and the court overrules the plaintiff's motion for a new trial and renders judgment on the verdict, such judgment should be affirmed although the defendant may not have been free from fault.

APPEAL from judgment District Court, Franklin county, in favor of defendant in action by Esther A. Lawrence against defendant to recover \$25,000 damages for personal injuries sustained by plaintiff at a crossing, defendant's Emporia Branch Railroad, about one-half mile south of Pomona.

JOHN W. DEFORD and H. P. WALSH, for plaintiff in error.

A. A. HURD, W. LITTLEFIELD and O. J. WOOD, for defendant in error.

The record does not contain all the evidence. The plaintiff and her sister-in-law, Lennie F. Lawrence, were driving north upon the highway in a two-horse single-seated top carriage, the side curtains being up or off. The plaintiff was on the right-hand or east side driving the horses. The railroad crosses the highway east and west almost at right angles bearing slightly to the north going east. To the west the track is straight for a mile and a half. The depot for Pomona station is 192 feet west of the crossing on the north of the

main track. There was a hedge on the west side of the highway, but it extended north only to a point 372 feet south of the railroad crossing. The ladies were driving at a trot, and drove to a point within fifteen feet of the crossing, when they saw the fast-freight train approaching from the west and not far away. They were frightened, and Lennie F. Lawrence struck one of the horses with the whip and they sprang forward onto the track when the train came upon them. Mrs. Lawrence was killed, as also one of the horses, and the plaintiff sustained very serious and, perhaps, permanent injuries. The station whistle, which was quite prolonged, was sounded about 4,500 feet west of the crossing, but the ladies did not hear it, there being a slight breeze from the east. When the engine was about 2,000 feet west of the crossing, the engineer saw the team and vehicle about 250 to 300 feet south of it. The jury, in answer to one question, found that the crossing whistle was sounded about 1,200 feet from the crossing, and in answer to another that it was sounded about 896 feet from the crossing. The bell was rung about 725 feet from the crossing, and the plaintiff testified that she heard the bell and whistle almost simultaneously, and that was her first knowledge of the approach of the train. The jury found that at a point thirty feet south of the crossing the ladies could have seen to a point 725 feet west of the crossing and at a point twenty-seven feet south to a point over 2,000 feet west of the crossing. The train was traveling at about thirty miles an hour, and must have been in plain view from the time that the ladies passed the north end of the hedge. Yet when they saw it first, and Mrs. Lawrence struck the horses with the whip, it could not have been more than 200 feet distant. The jury must have believed that the ladies did not exercise ordinary care (1).

Judgment affirmed.

Opinion by MARTIN, C. J.

ATCHISON, TOPEKA AND SANTA FE RAILROAD COMPANY v. GREEN.

Supreme Court, Kansas, January, 1897.

PROVINCE OF JURY.— In answering special questions the jury need not necessarily accept the testimony of any single witness, but may deduce the truth from the statements of all the witnesses.

1. The case is analogous to *Young v. Railway Co. (Kans.)*, 45 Pac. Rep. 583, where a demurrer to plaintiff's evidence was sustained by the trial court and the judgment affirmed.

EMPLOYEE KILLED IN ASH PIT UNDER ENGINE WHILE IT WAS MOVING OFF.—G. was engaged as an employee of the defendant in an ash pit cleaning an engine. When the engine was moved off, his head was caught and crushed between a bolt-head protruding from the heel of the pilot and a plate on the end wall of the pit. One witness for the plaintiff testified that he was first struck by the shaker bar and another by the links under the engine. The jury found that he was first struck by the ash pan, though no witness so testified in terms. It was shown by other testimony that the shaker bar on this particular engine was inside the ash pan, though on some other engines the shaker bars were outside. *Held*, that the jury were warranted in finding that the ash pan was the first thing that struck G.

DEFENDANT brings error from District Court, Sedgwick county, which rendered judgment in favor of plaintiff in action for damages by Maggie Green, whose husband, W. H. Green, was killed while employed by the railroad company in cleaning the fire boxes and other parts of its engines at Arkansas City.

A. A. HURD and STAMBAUGHE & HURD, for plaintiff in error.

J. D. HOUSTON and J. F. CRAIG, for defendant in error.

On the 16th of March, 1890, the plaintiff's husband went into a pit dug between the rails of one of the company's tracks, thirty feet long and three and one-half feet deep, for the purpose of cleaning an engine. He had nearly completed his work and was standing between the end of the ash pan of the engine and the south end of the pit when the engine was backed off the pit and his head was crushed between the end of a bolt that protruded from the heel of the pilot and an iron plate on the top of the south wall of the pit, causing his death. A general verdict was rendered in favor of the widow for \$3,000, and judgment entered thereon. There was evidence showing that the engine was started without notice to Green before he had finished his work; and the circumstances testified to by plaintiff's witnesses indicate that the first part of the engine that struck Green was the ash pan. It is insisted that the testimony of the plaintiff's own witnesses is opposed to the finding of the jury to that effect. J. C. Smoykefer testified that the links were the first thing that struck Green, and Cliff Williams testified that it was the shaker bar. The witness, Jack, does not appear to have seen Green until he was struck by the heel of the pilot. Witnesses for the defendant testified that on this particular engine the shaker bar was inside the ash pan, so that it could not have struck the deceased. In this state of the evidence it is insisted that the finding of the jury that the ash pan was the first thing that struck Green was contrary to the evidence. There was no direct statement of any witness that he saw the ash pan strike Green. If the main facts testified to by witnesses for the plaintiff were accepted by the jury, and if they also believed

from all the testimony in the case that the shaker bar of this engine was inside the ash pan so that it could not have hit Green, the most reasonable conclusion is that it was the end of the ash pan that hit him and that Williams was mistaken in that particular, though truthful as to the essential facts. It made little difference which struck him first. The effect would probably be the same in both cases.

Judgment affirmed.

Opinion by ALLEN, J.

REAMER ET AL. V. COLUMBIA.

Court of Appeals, Kansas, January, 1897.

OMISSION BY COURT IN INSTRUCTION NOT GROUND FOR REVERSAL IN ABSENCE OF REQUEST.—As a general rule where the court properly instructs the jury, except that it omits some matter which might properly be given, no available error is committed unless the court has been properly requested to instruct in reference to such matter.

APPEAL from judgment of District Court, Labette county, in favor of defendant in action by W. G. Reamer and Samuel Johnson against Joseph W. Columbia, for damages for negligence of a servant of defendant.

LEROY, NEAL and SON, for plaintiffs.

J. H. CRICKTON, for defendant.

It was contended by counsel for plaintiffs in error that under the evidence there should have been instructions covering the ground not only of negligence but contributory negligence. There was no request upon the part of the counsel for plaintiff in error that any further or different instructions should be given than those which were given by the court; and while we believe that there are portions of the instructions which, taken by themselves would be erroneous, yet we are confident that, taken as a whole, they presented the law fairly to the jury, and we are satisfied the jury was not misled. As a general rule, where the instructions fairly set forth the law of a case and no further instructions are requested, it is too late to complain when the case reaches a court of review.

Judgment affirmed.

Opinion by COLE, J.

**ATCHISON, TOPEKA & SANTA FE RAILWAY
COMPANY v. HINE.**

Court of Appeals, Kansas, January, 1897.

SPECIAL FINDINGS CONTRARY TO EVIDENCE.—Where the special findings of the jury are directly in conflict with all the evidence in the case and are not supported by any evidence, it is the duty of the trial court to set the verdict aside and grant a new trial.

SPARKS FROM ENGINE CAUSING FIRE.—Evidence that an engine threw sparks as it was starting from a depot with a freight train will not support a finding that a spark-arrester was out of repair, and warrant a jury to render a verdict for damages for causing a fire that destroyed the plaintiff's buildings, that were not situated near the depot.

APPEAL from judgment of District Court, Edwards county, in favor of plaintiff in action by F. B. Hine against the defendant to recover the value of a house and barn alleged to have been destroyed by fire caused by sparks from one of the defendant's engines.

A. A. HURD, W. LITTLEFIELD and O. J. WOOD, for plaintiff in error.

F. D. SMITH, for defendant in error.

The jury found, in answer to special questions, that the fire in question was caused by the negligence of the defendant company and that said negligence consisted in the fact that the engineer in charge of the engine in question took the same out without said engine being properly inspected, and further found that the netting composing the spark-arrester was out of repair so as to allow an unusual amount of sparks to escape, and that the engineer was careless in operating the engine while the netting was out of repair. They found, however, that the engine was of the most approved pattern, and provided with the latest appliances to prevent the escape of fire, and found no other act of negligence on the part of the company. If there is a conflict in the evidence, this court cannot set aside the verdict, nor ought the lower court to have done so. The act of 1885, which shifted the burden of proof with regard to negligence in a case of this character, prescribes that when it has been shown that a railroad company has set out a fire, negligence shall be presumed until the contrary is shown, but when the legal presumption has been fully rebutted by positive testimony, the plaintiff must show negligence as much as before the act of 1885. There was no direct proof that the netting was out of repair. The engineer

testified that he looked at the netting on the morning of the day of the fire before starting on his trip, and found the netting all right. The inspection was not made by an "inspector" on that morning, but it had been made by one two days before. The main question at issue is not what kind of inspection was made, but what was the condition of the engine; and the engineer testifies as to its condition and there is no evidence to the contrary. A witness for the plaintiff testified that he saw the train in question leaving a depot and that the engine was throwing a good many sparks; but because that engine threw a number of sparks when it started from the depot, the jury had no right to presume that the engine was throwing sparks when it reached the place where the buildings which were destroyed by fire were situated, and that the number of sparks thrown was unusual and sufficient to show that the netting in question must have been defective, and this the jury were compelled to do to arrive at the verdict they did. Evidence that the engine threw some sparks as it started from the depot will not support a finding that the netting was out of repair so as to allow an unusual amount of sparks to escape.

Judgment reversed

Opinion by COLE, J

UNION PACIFIC RAILWAY COMPANY V. MILLS.

Court of Appeals, Kansas, January, 1897.

INJURIES TO PREMISES BY FIRE ESCAPING FROM ENGINE.—Where the petition alleged negligence in running a train and engine from which sparks were permitted to escape, setting fire to dry grass along the company's right of way, which fire, it was stipulated, injured the premises of plaintiff the next day, having recommenced after being almost extinguished by defendant's employees and others, and the court charged that the defendant was liable for the failure of the employees to have extinguished the fire after once undertaking to do so, it was error, as there was no such allegation of negligence in the petition.

DEFENDANT brought error from District Court, Trego county, in action by H. S. Mills against defendant.

A. S. WILLIAMS, N. H. LOOMIS and R. W. BLAIR, for plaintiff in error.

DAY and MONROE, for defendant in error.

The petition alleged negligence in allowing fire to escape from the engine and in permitting dry grass and other combustible materials

to remain on its right of way, whereby fire was communicated to the premises that were burned. It was stipulated on the trial that a certain engine emitted sparks whereby fire was started in some dry grass. That the fire spread for a half or three-quarters of a mile and was there extinguished, except such as remained in two hay stacks. That the fire left in the hay stacks escaped the next day by reason of the wind and caused the damage for which the action is brought. The premises injured were eight or nine miles from where the fire started and the intervening space was covered with buffalo grass. Under the petition the plaintiff could only recover for injuries resulting from a fire caused by defendant either "in carelessly and negligently managing the train to which engine No. 620 was attached at the time and place of fire from its engine; permitting dead and dry grass and other combustible material to remain on its right of way." The first proposition is out of the case under the evidence and finding of the jury. As to the second the testimony shows that the engine was furnished with proper and approved appliances, and the jury so found, but they also found that the netting was out of order, and that the negligence of defendant consisted in not plowing and burning fire guards. This did not make the condition of the netting an act of negligence. The only testimony to prove the third allegation is that there was some grass growing on the right of way. This of itself is not negligence. *Railway Co. v. Butts*, 7 Kans. 308. The court erred in its instructions. It virtually told the jury that the railroad company was liable for a purely accidental fire, which it failed to extinguish after attempting to do so. The court instructed that the employes of the road having attempted to put out the fire "they must use reasonable diligence and care in taking care of it, and if they failed to do so the company is liable, without regard to the origin." The company was not charged in this action with negligence in not properly handling a fire after they had it under control.

Judgment reversed.

Opinion by GILKESON, J.

MCGHEE ET AL. V. BELL.

Court of Appeals, Kentucky, January, 1897.

DEFECTIVE APPLIANCE—KNOWLEDGE OF EMPLOYEE—RAILROAD LIABLE.—Where an employee of a railroad company was injured by the breaking of a defective lever handle of a hand-car, which was known to the foreman, and also to the plaintiff, but had been in use several days, the railroad company was liable.

APPEAL from judgment for plaintiff rendered in the Circuit Court, Fayette county. The facts appear in the opinion.

THORNTON and KERR, for appellants.

GEORGE DENNY, JR., and NELMS, YOST & POWER, for appellee.

LEWIS, CH. J.—While appellee, employed by appellants as section hand, was, in obedience to the order of the section foreman, operating, with others, a hand-car, the handle or lever broke, and he, in consequence thereof, fell backward upon the railroad track, and was run over by the car, and severely injured. He alleges, in his petition, and proves the defective condition of the lever handle was known to the foreman, for it was made by his direction, by one of the hands, of timber that was, in the language of the witnesses, "doted and worm-eaten." But, even if it had not been actually known to him, it was the duty of the foreman to ascertain and know that the handle was unfit, and the use of it was dangerous. It is also alleged in the petition that he (appellee) did not know of the decayed and defective condition of the handle. The lower court distinctly instructed the jury that if, at the time appellee was working with said lever, he knew, or by ordinary observation could have known, it was decayed or weak, and by reason of such decay or weakness was likely to break in using it, they should find for defendant (appellant). Nevertheless, appellee himself testified, on the trial, as a witness, that the "lever handle was made out of doty wood, worm-eaten, and wasn't any good. We were all afraid of it from the start." And thus arises a very serious question whether the verdict of the jury ought not to have been by the lower court set aside because flagrantly against the evidence.

The recognized rule is that the employer is bound to furnish the servant with proper and safe material and implements with which to do the work required; and if he knows, or by exercise of ordinary care and vigilance could have known, them not to be such, and by reason of negligence in that respect the servant is injured, the latter

is entitled to recover damages therefor. But when the employee knows all about the material or implements furnished, and, being fully aware of its defective and unsafe condition, voluntarily uses it, and thereby sustains an injury, he is without remedy. An obligation rests upon the employee to know that he has sufficient skill to know and to exercise ordinary vigilance to ascertain whether material or implements furnished by the employer are sound and safe. But the employer is not required to use any vigilance or care in inquiring about or testing the suitability and safety of materials and implements furnished, but has the right, and it is his duty, to look to and depend upon the employer in that respect; and it is only when, being fully aware of the defective and unsafe condition of such material, he voluntarily uses them, that he is without remedy for an injury resulting to himself therefrom. The time appellee was ordered by the foreman to go upon the hand-car and work the lever was after the close of the day's work, and the place was about four miles from where they all rested at night. The lever handle had been used without accident to any of the hands for several days, and it does not seem to us, therefore, that this is a case where the employee was, in the meaning of the rule, fully aware of the defective and unsafe condition of the material or implement, or, appreciating and knowing the danger, voluntarily used it. But the section foreman should be held to either have actually known, or have used ordinary diligence to know, the handle that he furnished and ordered appellee to use at a time and place where he was constrained to do so, was defective and unsafe. As, therefore, the fact testified to by appellee does not, in our opinion, deprive appellee of his remedy for the injury done, and he showed a cause of action in all other respects, the judgment is affirmed.

LOUISVILLE AND NASHVILLE RAILROAD COMPANY v. MATTINGLY.

Court of Appeals, Kentucky, January, 1897.

EXCESSIVE DAMAGES.— Judgment for \$10,000 excessive where the injuries to plaintiff were sustained in his left ankle and his back and side, but were not permanent, the only probable permanent injury being to the urinary organs, and the plaintiff was only confined to his house for a few weeks.

EMPLOYEE INJURED IN TUNNEL—AGENT'S KNOWLEDGE OF DANGER—INSTRUCTION.— Where plaintiff, in the employ of defendant, was injured by the falling of slate in a tunnel where he was working, an instruction

should have been given that, if the tunnel was in a dangerous condition, plaintiff could only recover if defendant's agent knew of such condition or could have known it by the use of reasonable care.

APPEAL from judgment for plaintiff rendered in Circuit Court, Marion county. The facts appear in the opinion.

WILLIAM LINDSAY, H. W. BRUCE, and LISLE & MCHORD, for appellant.

THOMAS H. HINES and H. P. COOPER, for appellee.

HAZELRIGG, J.—The appellee was a bridge carpenter, and while he was engaged with other workmen repairing or taking out the old framework in a tunnel on the line of the appellant, a quantity of slate suddenly fell from the walls of the tunnel, and seriously injured him. The extent of his injuries is a matter of uncertainty under the proof, and it is doubtful if they are shown to be permanent, save, perhaps, that which renders one of his ankles less free in its movements than it was in its natural and original state. In this suit for damages for the injuries he received a judgment for \$10,000. One of the physicians called by him testified that he found the left leg of the appellee smaller than the right; that the left ankle seemed to be impaired, but there was no malformation of either ankle or leg; that the right side measured an inch and one-half or two inches larger than the left, and this might have been caused by a hurt, and was perhaps permanent to some extent. Another physician testified that the ankle was stiffened some, and appellee could not make all the natural movements with his ankle; that when appellee stooped over he did not seem to have good use of his back, and the muscles in the side of his back seemed swollen; that on examination of the urine two or three times he found blood in it, and, if this was caused by the injury, it was probably permanent, and would grow worse and chronic. It seems to us clear that this verdict is excessive, and strikes the mind at first blush as having been superinduced by passion or prejudice. The appellee was confined to his house but a few weeks, and, if his injuries have resulted in anything very serious, he has not demonstrated it by the proof. It is further insisted by the appellant that there was no proof of negligence on the part of any of its agents or servants, and the case ought not to have gone to the jury. It appears from appellee's own testimony that he did not see "any cracks in the wall of the tunnel at the point where the slate fell from, or anything that indicated that the slate would fall;" and it is also true that his opportunity for seeing was as good as that of the foreman. But it appears from other testimony that the foreman, Andes, was not as efficient in making examination of the walls as he ought to have been, and

was not as careful in doing this kind of work as he ought to have been. This testimony was gotten before the jury mainly by a witness detailing a conversation, on the day following the accident, between Andes, the foreman of the crew of which the appellee was a member when he was hurt, and one Lee, who was the supervisor of the division including the tunnel under repair. The conversation was not objected to, and on all the proof, as it is presented in the record, we are inclined to think the motion for a peremptory instruction by appellant was properly overruled. By the chief instruction the jury was told to find for the plaintiff if the injuries to him were caused by the gross negligence of the appellant's agents or employees superior in authority to plaintiff in permitting the tunnel to be and remain in an unsafe and dangerous condition, and to fall or cave in upon the plaintiff. This is misleading. Undoubtedly, in a sense, the appellant permitted the tunnel to be in an unsafe condition. The sides caved in and fell on the plaintiff; hence it was unsafe. But did the appellant's foreman know this, or could he have known it by the use of reasonable diligence and care? Unless he so knew, or could have so known, the appellant is not liable. For the reasons given, the judgment is reversed for proceedings consistent herewith.

LEE v. CHESAPEAKE AND OHIO RAILROAD COMPANY.

Court of Appeals, Kentucky, January, 1897.

WORKING ON TRACK — MOVING CROSS-TIES — FELLOW-SERVANT.—

Where plaintiff and two other employees of defendant were moving a cross-tie and one of the men stumbled, causing the tie to fall on plaintiff, there was nothing to render defendant liable for plaintiff's injuries.

APPEAL from judgment for defendant rendered in the Circuit Court, Carter county.

JAMES ANDREW SCOTT and FRANK PRATER, for appellant.

JOHN T. SHELBY, for appellee.

Plaintiff brought action to recover damages for broken leg caused by alleged negligence of defendant's section foreman. In putting new in place of old cross-ties, at a certain switch station, it became necessary to carry the latter across and away from the railroad track; three persons, two of them using a handspike and one of them lifting the rear end, being assigned to each tie. One of the

men on the tie on which plaintiff was engaged in moving gave up the load and the section foreman took his place. On the way the foreman stumbled and fell, causing plaintiff to fall, and the tie fell upon him and broke his leg. The load was a heavy one for three men, but it was shown that it was not too heavy, being a customary load. If plaintiff found it too heavy, he could have withdrawn as did the other man. The plaintiff took the risks of his employment. There was no evidence whatever of defendant's liability for the injury.

Judgment affirmed.

Opinion by LEWIS, CH. J.

LOUISVILLE AND NASHVILLE RAILROAD COMPANY v. BOLTON.

Court of Appeals, Kentucky, January, 1897.

NEGLIGENT BURIAL OF HORSE — DAMAGES.—Compensatory damages may be recovered for injury resulting from the negligent burial of a dead horse on property adjoining a dwelling-house, and where the act was malicious, punitive damages may be given.

APPEAL by the railway company from judgment for plaintiff in the Circuit Court, Knox county. The facts appear in the opinion.

WILSON & RAWLINGS, for appellant.

B. B. GOLDEN, J. D. TUGGLE, and W. H. HOLT, for appellee.

LEWIS, CH. J.—This action was brought by appellee to recover of appellant damages alleged to have been done on account of dead animals being put and insufficiently buried by servants of the latter near the residence of the former. The lower court instructed the jury as follows: "If the jury believe, from a preponderance of the evidence, that the defendant, by its agents, so buried a steer or horse near the dwelling-house of plaintiff that foul and obnoxious stench and smells arose, polluting the air in and around plaintiff's said dwelling-house, and that same was done wantonly and maliciously, they will find for plaintiff such damages as they may deem right, not exceeding two hundred and fifty dollars for each. If, however, they should believe that the burying was done simply in such a negligent manner as to cause such smells, and not from malice and wantonness, they will find for the defendant." The evidence shows the acts complained of were done against the protest of

appellee, in such wanton manner and under such circumstances as precludes this court from believing or deciding the verdict of two hundred and fifty dollars is excessive, or was rendered by the jury through passion or prejudice. Really, the instruction was more favorable to appellant than the law and facts proved authorized; for appellee would have been entitled to recover compensatory damages upon proof of the acts alleged and consequent injury, and upon showing, as we think was done, that it was wanton or malicious, he was entitled to punitive damages, which were in the instruction denied him. How much it would have cost appellant to cover with dirt that part of the dead animals left by the agents of appellant exposed was immaterial, because it was their duty at first to have so buried it as to prevent noxious and offensive stench, and their failure to do so rendered appellant liable in damages.

Judgment affirmed.

MEISHER v. ALBER.

Court of Appeals, Maryland, January, 1897.

FALLING DOWN ELEVATOR SHAFT — CONTRIBUTORY NEGLIGENCE.—Where plaintiff was shown to have been familiar with the surroundings of an elevator, but failed to exercise proper care in passing, he should have been nonsuited in an action for injuries sustained in falling through opening, as contributory negligence was clearly proved.

APPEAL by defendant from judgment rendered for plaintiff (John F. Alber) in the Superior Court, Baltimore city.

BERNARD CARTER, CHARLES H. CARTER and BERNARD M. CARTER, for appellant.

THOMAS C. WEEKS, for appellee.

Plaintiff, who had been in the employ of defendant for more than fifteen months, and was engaged in making sausage meat, the duties of which required him to pass from one room to another between which was an elevator, the floor of which elevator, when not in use, was used as a passageway between the rooms, that fact being well known to plaintiff who was also acquainted with the surroundings of the building. On the occasion of the accident plaintiff was passing between the rooms when he fell through the elevator opening into the cellar below, and was injured. He was in full possession of all his faculties. He admitted in evidence that he was in a hurry and might have avoided the accident if he had stopped long enough to

look. *Held*, that plaintiff was guilty of contributory negligence and should have been nonsuited at the trial (1).

Judgment reversed.

Opinion by BRISCOE, J.

BALTIMORE TRACTION COMPANY v. HELMS.

Court of Appeals, Maryland, January, 1897.

INJURED WHILE CROSSING STREET — CONTRIBUTORY NEGLIGENCE.—Where a person deliberately walks out from behind a street car from which he has alighted, and attempts to cross a public street, without using his powers of observation, and is injured by an approaching car, which injury could have been avoided by the use of ordinary care, he cannot recover damages for such injury (2).

APPEAL by defendant company from Court of Common Pleas from judgment rendered for plaintiff.

EUGENE H. HARRIS, FIELDER C. SLINGLUFF and W. PINKNEY WHYTE, for appellant.

B. ROSENHEIM and WILLIAM COLTON, for appellee.

On March 19, 1895, the plaintiff boarded a car of the Baltimore Traction Company bound east on Fort avenue. On this avenue there is another track of the same company, which is used for its

1. In its opinion the court said, that while it is true that the question of negligence is ordinarily one of fact, and not of law, yet cases do occur in which it becomes the duty of the court to interpose, and withdraw them from the consideration of the jury. It must present some prominent and decisive act, in regard to the effect and character of which no room is left for ordinary minds to differ. Citing *Cumberland Valley R. R. Co. v. Mangans*, 61 Md. 593, 3 Am. Neg. Cas. 648, 652.

2. As to the duty of pedestrians to exercise due care in crossing streets the court cited *Cooke v. Traction Co.*, 80 Md. 551, 31 Atl. Rep. 327; *Railroad Co. v. Kehoe* (Md.), 35 Atl. Rep. 90; *Railway Co. v. McKewen*, 80 Md. 593, 31 Atl. Rep. 797; *Buzby v. Traction*

Co., 126 Pa. St. 559, 17 Atl. Rep. 895, 6 Am. Neg. Cas. (which case is similar to the one at bar); *Meyer v. Railway Co.*, 6 Mo. App. 27; *Kelly v. Hendrie*, 26 Mich. 261; *Scott v. Railroad Co.*, 59 Hun, 456, 13 N. Y. Supp. 344; *Davenport v. Railroad Co.*, 100 N. Y. 632, 5 Am. Neg. Cas. 254, 3 N. E. Rep. 305; *Sheets v. Railway Co.* (N. J.) 24 Atl. Rep. 483; *Railway Co. v. Block*, 55 N. J. L. 606, 27 Atl. Rep. 1067; *Schulte v. Railroad Co.*, 44 La. Ann. 509, 10 Southern Rep. 811.

But the failure to stop and look before crossing a street railway will not, under all circumstances, *per se*, constitute contributory negligence. *Burbridge v. Railroad Co.*, 36 Mo. App. 670, 4 Am. Neg. Cas. 375; *McClain v. Railroad Co.*, 116 N. Y. 465, 22 N. E. Rep. 1062.

cars going west. The track used by the cars running east is on the south side, and that used by the west-bound cars is on the north side, of Fort avenue. The plaintiff alighted from an east-bound car at or near the corner of Fort avenue and Garrett street, and proceeded at once, in the rear of the car he had just left, to walk north across Fort avenue. He was injured by one of the cars of the defendant company moving west. According to plaintiff's testimony, when the car in which he was riding was approaching Garrett street, he notified the conductor to stop. The car having stopped, he left it; and what subsequently happened was described by him in his examination in chief, his cross-examination, and in his answers to a series of questions put to him by the learned judge below. From his own account of this unfortunate occurrence, there is ample evidence to show that he was injured by reason of his own carelessness and reckless disregard of his own safety.

By the well-settled law applicable to the class of cases to which this belongs, it is not enough for the plaintiff to prove the negligence of the defendant, and the injury which followed, but he is bound also to establish, by satisfactory proof, before he can recover, that he was himself free from negligence, and exercised ordinary care to avoid the consequences of the defendant's negligence. The right to recover depends upon two distinct propositions of fact: First, the negligence of the defendant, and second, the exercise of due and ordinary care by the plaintiff. And if he failed to prove negligence on the part of the defendant, or if it appear from his own evidence that he was guilty of negligence directly contributing to the injury, he cannot recover. Assuming, then, from the plaintiff's testimony, that the defendant was guilty of negligence in running its car, in violation of the city ordinance, at the high rate of speed testified to, was the plaintiff guilty of such contributory negligence as will prevent a recovery? He walked deliberately, from behind a street car, across a track on which he knew cars were running at intervals of a few minutes. It fully appears from his testimony that, if he had looked, he could have seen the car approaching, and that no accident would have happened. If the circumstances are such that one with normal sight and hearing could see and hear them, his duty requires him to use his senses to guard against injury by the negligence of others. *Steever's Case*, 72 Md. 157, 19 Atl. 449. And this rule applies generally to every situation in life. See *Price's Case*, 29 Md. 420. Whatever may have been the opinion of the plaintiff as to his power to stop and look before crossing the track, the fact is that he did not take this precaution. Nor is there anything in the evidence to show that he, or any man with

ordinary powers, could not have both stopped and looked in time to avoid injury. It does not appear, however, that he made any effort to do either, for he was in the center of the track before he saw the car. If a witness who can see testifies that he looked, and did not see an object which, if he had looked, he must have seen, such testimony is unworthy of consideration. And likewise when a witness testifies, as did the plaintiff in this case, that, if he had stopped in the space between the tracks, he could have stood there in safety while the car passed him, it is to no purpose that subsequently he should be willing to stultify himself, and declare that under the circumstances it was impossible for him to stop in time to avoid the injury. Such testimony is so contradictory and inconclusive that it is unworthy of consideration, and should not, therefore, be allowed to go to the jury.

Judgment reversed, without a new trial being granted.

Opinion by FOWLER, J.

PRICE v. PHILADELPHIA, WILMINGTON AND BALTIMORE RAILROAD COMPANY.

Court of Appeals, Maryland, January, 1897.

STRUCK BY TRAIN WHILE TRESPASSING ON TRACK—INTOXICATION—BURDEN OF PROOF.—Where a person, while in an intoxicated condition upon a railroad track, was struck by a train, he must, in order to recover, show that the defendant company was negligent, and that the injury was the direct consequence of such negligence.

APPEAL from judgment for defendant from Circuit Court, Cecil county.

GEORGE Y. MAYNADIER, JOHN S. YOUNG and ALBERT CONSTABLE, for appellant.

JOHN J. DONALDSON, L. MARSHALL HAINES and CHARLES C. CROTHERS, for appellee.

Action originally brought in the Circuit Court for Harford county, and removed thence to the Circuit Court for Cecil county, for trial. The plaintiff, at the time of the accident, lived at Leyre's Point, on the west side of Bush river, in Harford county. On the morning of July 8, 1892, he purchased at Magnolia station, on the appellee's road, an excursion ticket to Baltimore, which entitled him to a return ride to Magnolia. He rode to Baltimore, and, in the evening of the same day, he returned over the appellee's road, in the

direction of Magnolia station. There is nothing in the record to show when he left the train, or what became of him, until seen by William Gunther, who, together with other employees of the appellee, was engaged in preparing timber for a bridge over Bush river. Gunther, supposing plaintiff was about to cross the bridge, as he lived in that direction, warned him to be careful as there were trains passing. He replied that he was not afraid of the cars. The plaintiff, testifying in his own behalf, proved that he had been drinking, and shortly after he left Bay View station, on his return trip, the whisky he had taken "took great effect on him," and he lost consciousness, and never regained it until one month thereafter, when he found himself at the Baltimore City hospital, under treatment for the injuries he had received, and that he did not know how he was injured, except from what he had been told by others.

The testimony of John Donahoo, for plaintiff, shows that "on an evening in a summer two or three years ago, he was standing at his house, before sundown, intending to go fishing on a bridge of defendant's road. That, before leaving his house, he looked towards said bridge, and saw a man sitting on the railroad, where it passes over the embankment or approach to a bridge. That he walked in the direction of the embankment, where the man was sitting; and when he got to a point distant from him of about two hundred yards, he saw a freight train coming from the direction of Baltimore, and stop. Approaching the train, he found that the man had been struck, and was lying between the railroad tracks. He was the only one there excepting the trainmen. One of the trainmen told witness that he saw something on the railroad, but could not tell what it was, whether it was a hog, or calf, or what. That there is a clear, unobstructed view of the embankment whereon the appellant was sitting when struck, of three or four miles, the road being perfectly straight, and nearly level.

Upon the conclusion of the testimony for the appellant, the appellee prayed the court to instruct the jury "that there is no evidence in this case legally sufficient to entitle the plaintiff to recover." The court granted this prayer, which was excepted to by plaintiff (1).

1. The court while holding that the burden of contributory negligence is upon the defendant and that it is generally a question of fact for the jury, yet where plaintiff has clearly demonstrated his own negligence, "the question may become one of law for the court to dispose of as upon a demurrer to evidence, and nothing remains for

the jury to consider or pass upon." Citing *Northern Central R. R. Co. v. State*, 54 Md. 113; *Balt. & P. R. R. Co. v. State*, 54 Md. 648; *State v. Balt. & P. R. R. Co.*, 58 Md. 482; *Balt. & O. R. R. Co. v. State*, 62 Md. 479; *State v. Balt. & O. R. R. Co.*, 69 Md. 498; *State v. Balt. & O. R. R. Co.*, 69 Md. 551.

The only question arising on the appeal is the sole inquiry as to whether the prayer was properly granted. The appellee offered no testimony, so the case rested entirely upon the effect of appellant's testimony. To entitle appellant to recover it was incumbent upon him to show that appellee had neglected its duty and that the injury sustained was the direct consequence of such negligence. This appellant failed to do, and having failed to make out a case, the prayer of appellee was properly granted (1).

From the plaintiff's evidence it was apparent that his own negligence, due to his drunken condition, was the sole cause contributing to his injury and there was nothing to show that the defendant failed to use reasonable care.

Judgment affirmed.

Opinion by ROBERTS, J.

CHASE v. MAINE CENTRAL RAILROAD.

Supreme Judicial Court, Massachusetts, January, 1897.

INJURED AT CROSSING—CONTRIBUTORY NEGLIGENCE—BURDEN OF PROOF.—Where plaintiff's intestate was driving and came into collision with a train at a crossing and was fatally injured, the burden is upon plaintiff to show that his intestate was in the exercise of ordinary care.

APPEAL from judgment on verdict directed for defendant in Superior Court, Suffolk county.

ROBERT M. MORSE and J. W. SPAULDING, for plaintiff.

STROUT & COOLIDGE and HENRY N. RICE, for defendant.

Action for injuries sustained by plaintiff's intestate, by reason of the wagon in which he was driving coming into collision with a train of cars of defendant, at a place in Richmond, in the State of Maine, where a highway crossed the single-track road of defendant, at grade. The accident happened in the afternoon of August 17, 1887, and the trial took place in the Superior Court in January, 1896. The presiding judge, at the close of the plaintiff's evidence, ruled that the plaintiff had offered no testimony which would authorize the jury in finding that the intestate was in the exercise of such due care as is required by law to enable the plaintiff to recover.

1. The court cited *Kean v. Railroad Co.*, 61 Md. 168, to the effect that plaintiff's own want of care and reckless negligence in putting himself in a place of danger would deprive him of all ground of action against the defendant.

The report set forth sufficient acts of negligence on the part of the defendant, in running its train at a higher rate of speed than is allowed by law where a flagman or a gate is not maintained at a crossing at grade, and in not ringing a bell and sounding a whistle. On the question of due care on the part of the intestate, there was evidence tending to show the following facts: On the day of the accident, the intestate was driving a horse in an open Concord wagon, at a moderate trot, from Pleasant street, through South street, westerly towards and across the railroad. With him in the wagon was a boy named Haley, who was then six years and eight months old, and who was the only witness produced who was present at the time of the accident. Pleasant street appears, from a plan produced at the trial, to be about 420 feet from the crossing on South street, where the accident occurred. As the intestate approached the track, he did not stop or slacken speed; but, when he got to the railroad, the horse started up, and attempted to cross the track in front of the train, which was approaching from the north. Then the intestate attempted to pull up the reins, which had been loose,—that is, not pulled up tight,—but did not stop the horse. The train struck the wagon, and the intestate and the boy were thrown violently therefrom, and the intestate died from his injuries seventeen days afterwards. There was also evidence that when near the house of one Scott, which is about fifty feet from the crossing, the intestate pulled out his watch, and looked at it; that the train which struck the wagon was known as the "Flying Yankee," and it passed through the town once a day, going south; that the time it was due was well known, approximately; that on the day of the accident it was late, one witness testifying it was nineteen minutes late; and that the train was making no more noise than usual, and was accompanied by a great cloud of dust. There was also evidence that this train, in summer, was as likely to be late as on time. South street, from Pleasant street to the crossing, was a level, smooth road. There was evidence that the railroad, before reaching the crossing, passed through a cut, the highest point of which was seven feet, 200 feet from the crossing. There were also some fences, three and one-half to four feet high, and a building and barn, and some fruit trees, all of which, it is contended, interfered with the view of the approaching train. It is obvious, however, that a man on the seat of an open Concord wagon would not have his view interfered with by the fences, or by the fact that the cars passed through the cut. The building and barn were on the corner of Pleasant street and South street, and could not have interfered with the intestate's line of vision except for a few moments, after turning into South street.

If the fruit trees were high enough to obstruct the view of the intestate, it appears from the plans and photographs that, during nearly all the time he was on South street, these trees would not interfere with his seeing the train for a distance of, at least, 200 feet from the crossing until it arrived there.

The case presented is of a man approaching a railroad crossing at grade, driving with his reins loose, at a moderate trot, without stopping or slackening speed, not looking or listening for an approaching train, and not thinking, apparently, anything about it, until, as he got to the railroad, the horse starts up, and attempts to cross the track, and the driver makes an effort to stop the horse, when it is too late. If this case had been tried in Maine, there can be no doubt that the plaintiff would not have been entitled to recover. It is well settled in that State that, where a collision occurs between a traveler upon the highway and a train of cars, it is *prima facie* evidence of negligence on the part of the traveler; that a person approaching a railroad crossing at grade must look and listen before passing over; and that, if his view is obstructed, he must stop and listen carefully (1). The general rule in Massachusetts, undoubtedly, is that, as a railroad crossing is a dangerous place, a traveler on the highway is bound to make a reasonable use of his sense of sight as well as of hearing, in order to ascertain whether he will expose himself to danger; that if he fails so to use his senses, without reasonable excuse, he fails to use reasonable care; and that the burden is on the plaintiff to show such care, even though the defendant is in fault (2).

Judgment on the verdict affirmed.

Opinion by LATHROP, J.

1. On this point the court cited *Grows v. Railroad Co.*, 67 Me. 100; *State v. Railroad Co.*, 76 Me. 357; *Les- san v. Railroad Co.*, 77 Me. 85; *Chase v. Railroad Co.*, 78 Me. 353, 5 Atl. Rep. 771; *State v. Railroad Co.*, 80 Me. 430, 15 Atl. Rep. 36; *Smith v. Railroad Co.*, 87 Me. 339, 32 Atl. Rep. 967.

2. The court cited *Butterfield v. Rail- road*, 10 Allen, 532; *Allyn v. Railroad*,

105 Mass. 77; *Wright v. Railroad*, 129 Mass. 440; *Tully v. Railroad*, 134 Mass. 499; *Wheelwright v. Railroad*, 135 Mass. 225; *Allerton v. Railroad Co.*, 146 Mass. 241, 15 N. E. Rep. 621; *Fletcher v. Railroad Co.*, 149 Mass. 127, 21 N. E. Rep. 302; *Donnelly v. Rai- road*, 151 Mass. 210, 24 N. E. Rep. 38; *Debbins v. Railroad Co.*, 154 Mass. 402, 28 N. E. Rep. 274; *Tyler v. Railroad Co.*, 157 Mass. 336, 32 N. E. Rep. 227.

YOUNG v. MILLER (1).

Supreme Judicial Court, Massachusetts, January, 1897.

EMPLOYEE ASSUMING RISK OF EMPLOYMENT.—A workman who is injured by falling through a trapdoor left open by a fellow-workman during the noon hour cannot recover damages from the employer when the workman knew that the trapdoors were where they were and were likely to be opened from time to time.

EXCEPTIONS from a ruling for defendant of the Superior Court, Plymouth county.

Plaintiff was employed as a general workman by the defendant, whose engineer, while at work in the building, left a trapdoor open and plaintiff fell through.

R. O. HARRIS, for plaintiff.

J. LOWELL, JR., and H. H. DARLING, for defendant.

HOLMES, J.—The plaintiff knew the permanent elements of the danger to which he was exposed. He knew that the trapdoors were where they were, and that they were likely to be opened from time to time. The doors of themselves were not a defect, and he took the risk of them. The only thing he did not know was the precise moment when the doors would be raised, but that he could find out if he looked. They were raised, and the accident happened, during the noon hour, at which time the plaintiff was not called on to work.

A majority of the court are of opinion, although I share the doubts of the minority, that the defendant's duty did not extend to giving notice or warning that the doors were open to one who knew that they were liable to be so at any time. See *Keenan v. Illuminating Co.*, 159 Mass. 379, 34 N. E. 366; *McCann v. Kennedy*, 167 Mass. 23, 44 N. E. 1055.

Exceptions overruled.

1. Compare with *Hogarth v. Pocasset Mfg. Co. (Mass.)* next case reported in this volume.

HOGARTH v. POCASSET MANUFACTURING COMPANY.

Supreme Judicial Court, Massachusetts, January, 1897.

MASTER AND SERVANT—FALLING INTO TRAPDOOR OF WHICH EMPLOYEE WAS NOT AWARE.—An employee who is injured by falling into an open trapdoor, the existence of which she testified she was not aware of, is entitled to have the question of negligence submitted to the jury. She is not to be assumed actually to have known of every detail of the structure without warning.

PLEADING.—An allegation in a declaration that defendant negligently maintained a certain trap and opening in the floor of the room where plaintiff worked and into which she fell, will be construed to mean that the defendant negligently kept the opening at the moment of the accident.

ACTION brought in Superior Court, Bristol county, by Ellen Hogarth against the defendant for personal injuries while in its employ as a mill operative. It was alleged in the declaration that the defendant negligently maintained in the floor of the room where the plaintiff worked a certain trap and opening into which she fell while in the exercise of due care. The defendant asked for instructions, and rulings declaring it not liable, which were refused, and the case was submitted to the jury. Defendant brings exceptions.

J. W. CUMMINGS and E. HIGGINSON, for plaintiff.

JENNING & MORTON, for defendant.

This case is not unlike *Young v. Miller* (Mass.) 45 N. E. 628 (1), in its facts, except that here the plaintiff testified that she did not know of the trapdoor. Her testimony is hard to believe, no doubt, as she passed over the door many times a day, and as the wheels of her bobbin box probably jolted as they went over its hinges; but we cannot say that she must have known it. She may have been unusually absent-minded. Again, it does not follow, from the fact that she took the risk of dangers permanently incident to the visible permanent structure (*Gleason v. Railroad Co.*, 159 Mass. 68, 34 N. E. 79), that she must be assumed actually to have known of every detail of the structure, and therefore to have known of the trapdoor, and the possibility of its being open once in awhile. Thus it will be seen that the case is stronger than *Young v. Miller*, and, notwithstanding the decision in the case, which was very near the line, a majority of the court are of opinion that a jury

1. See the preceding case reported in this volume.

might have found the plaintiff entitled to be warned to look out for the opening of the doors. On the evidence the plaintiff was entitled to go to the jury, and the judge was right in refusing to rule the other way.

It is argued that the declaration only charges an improper construction. If attention had been called to it plaintiff would probably have amended. Although the verb used is "maintained," the object is "trap and opening," and undoubtedly the plaintiff meant to charge the defendant with negligently keeping the opening at the moment of the accident. We must assume that to have been the issue tried.

Exceptions overruled.

Opinion by HOLMES, J.

PERKINS V. FURNESS ET AL.

Supreme Judicial Court, Massachusetts, January, 1897.

FALLING THROUGH HATCHWAY OF SHIP — EVIDENCE.—Where a person engaged by an ice company to store defendant's ship with ice fell through a hatchway, due to the negligence of the ship's employees in removing a plank and covering the opening with a tarpaulin without notifying that the plank had been removed, the question of negligence was for the jury, and verdict for plaintiff was justified from the evidence.

EXCEPTIONS from Superior Court, Suffolk county. Judgment for plaintiff and exceptions by defendants.

CHARLES W. BARTLETT and ELBRIDGE R. ANDERSON, for plaintiff.
JOHN LOWELL, JR., and SAMUEL H. SMITH, for defendants.

Action brought by Hollis M. Perkins against Furness, Withy & Co., for injuries sustained while loading ice on one of defendant's ships. At the time of the accident plaintiff was at work on one of defendant's steamers getting ready to take in ice to be used for refrigerating purposes in connection with the cargo, which consisted largely of fresh beef. He was there by the implied invitation or permission of the defendants, though not in any way in their service, but in the employ of other parties. He was injured by falling through a hatchway which had been left insecure. The ice was put into the ship by an ice gang, of which the plaintiff was one. It was hoisted from the wharf, and lowered through the upper No. 1 hatch into the lower No. 1 hatch, and was taken from there to the refrigerators. The lower hatch was prepared for this use by putting across

it planks or hatch covers, provided for the purpose, and each about eighteen inches wide, and then covering the whole with a tarpaulin, which came down over the combings of the hatch. The tarpaulin was for the purpose of preventing water from the ice from dripping through into the hold. This was the usual way of fixing the hatch for the "icing of the ship," as it was termed. There was testimony tending to show that the hatch was apparently in this condition when the plaintiff went there to work, about six o'clock, and continued so until the accident, about an hour and a half later. The accident was due to the fact that one of the planks or hatch covers had been taken out, and the tarpaulin put back on the opening thus left, without anything to show that the plank had been removed. The plaintiff stepped on the hatch, and fell through this opening. It appeared that, earlier in the day, stevedores had been discharging cargo through this hatchway; but they had finished about two o'clock, and the hatch covers had all been put back, and a tarpaulin spread over them, and after that the stevedores had nothing to do with the hatch. After the stevedores got through, and before the ice gang came, some of the crew and some carpenters went down into the hold, the former to sweep it and the latter to repair the sheathing and ceiling, and one of the hatch covers was taken up, and the tarpaulin rolled back. The carpenters were not in the defendant's employ, but in that of independent contractors. There was testimony tending to show that the crew came up a little before the carpenters, and that the carpenters were the last persons in the hold, and when they came up all went away together, and that none of them did anything to the tarpaulin.

Although the plaintiff had had a great deal of experience as a seafaring man, and had iced this and other vessels several hundred times in all, and "was as familiar with the hatches as any one could be," there was nothing to show that he had any reason to suppose, from the appearance of the hatch, or from anything else, that one of the hatch covers had been removed. The nature of his occupation required him to be about and on the hatch. The captain testified that he knew that the ice men were coming at six o'clock, and the plaintiff was justified in assuming that the hatch would be in a safe condition for him to work upon, and was not bound, in the exercise of due care, to examine it for the purpose of ascertaining whether all of the hatch covers were in place. It was for the jury to say whether the plaintiff knew, or ought to have known, that the plank which he took for the runway was one of the hatch covers, and therefore ought to have been upon his guard respecting the hatch. There being evidence of negligence on the part of the servants of

the defendants, and of due care on the part of the plaintiff, the weight to be given to it was, of course, for the jury.

Exceptions overruled.

Opinion by MORTON, J.

BREUCK v. CITY OF HOLYOKE.

Supreme Judicial Court, Massachusetts, January, 1897.

HOUSES INJURED BY DEFECTIVE SEWER—ILLEGAL CONNECTION DEFEATS RECOVERY.—Where plaintiff's houses were injured due to alleged negligence of a city, in not providing sufficient sewage capacity, by reason of which neglect the sewage was forced back into plaintiff's buildings, undermining and injuring them, recovery cannot be had against the city where it was shown that plaintiff's houses were not legally connected with the sewer, the connection being made in violation of the city ordinances.

EXCEPTIONS from Superior Court, Hampden county.

A. L. GREEN, for plaintiff.

ARTHUR B. CHAPIN (City Solicitor) and E. W. CHAPIN, for defendant.

Action by Otto Breuck against the city of Holyoke, for damages to his property caused by defective sewer. Trial was had in March, 1896, resulting in verdict being directed for defendant, to which plaintiff excepted. The declaration had three counts. The first alleged that the defendant negligently failed to keep a sewer in repair, whereby the plaintiff, who was in the exercise of due care, suffered injury to his property; the second, that the sewer was negligently suffered by the defendant to be out of repair, whereby the plaintiff's real estate was damaged, he being in the exercise of due care; and the third count, that the defendant ought to have built the sewer upon such a plan and in such a manner as was suitable to carry off the sewage, but negligently failed to do so, and, instead, built the sewer of insufficient capacity, and of such a plan and in such a manner as to be insufficient to carry off the sewage, which forced the sewage back into the plaintiff's buildings, whereby they were undermined and injured, he being in the exercise of due care. The defendant's answer was a general denial. The case was tried before a jury in the Superior Court, and, after verdict, was reported by the presiding justice for the determination of this court. The report, after reciting a few facts as to which it is assumed there was no dispute, states that the jury took a view, and that material evidence was introduced by both parties, and then recites the testimony

of five witnesses called by the plaintiff, and of three called by the defendant, as all that is material to the issue. The report then states that, after this evidence was in, the defendant asked the court to rule that the plaintiff could not recover, and further offered in evidence certain city ordinances for the purpose of showing that the plaintiff was not legally connected with the sewer, and for any other purpose for which they might be competent. The plaintiff objected to the admission of this line of defense, because it was not specifically set out in the answer. The presiding justice excluded evidence of the ordinances, and required the jury to find whether a want of due care on the part of the plaintiff contributed to the overflow into his cellars, and whether the want of due care by the defendant in the construction or maintenance of its sewer was the sole cause of the overflow, and the amount of damage, if any, which the plaintiff suffered in his property as the direct result of the overflow. The jury then found that the plaintiff's injury came in no wise from his neglect, but did result from the negligence of the defendant, and that the plaintiff's damages were \$700. After these special findings, the court admitted in evidence the city ordinances, and directed a verdict for the defendant, to which the plaintiff excepted, with the agreement that the case should be reported to this court, and that if, under all the evidence, the plaintiff was entitled to have his case submitted to the jury, the verdict should be for him for \$700, and that otherwise the verdict for the defendant should stand. The question for decision is, therefore, whether there is any view of the whole evidence upon which the plaintiff was entitled to have the case submitted to the jury. Upon an examination of the reported evidence, we are of opinion that the plaintiff was not entitled to have the case submitted to the jury. The evidence tended to show no damage which was not caused in part by the connections with the sewer, made and maintained by the plaintiff contrary to the city ordinances; and this brings the case within the ordinary rule that a plaintiff cannot recover damages which are in part caused by his own negligence or wrong. It is not an answer to say that the jury found specially that the want of due care by the defendant in the construction or maintenance of the sewer was the sole cause of the overflow, for the reason that the city ordinances were not before the jury. The greatest possible effect which, under the circumstances, can be given to the special findings, is that the overflow was due to faulty construction or maintenance of the sewer, and was not at all caused by any faulty construction of the plaintiff's connections with the sewer. The findings are not inconsistent with the defendant's contention that the connections themselves were

made in contravention of the ordinances; and because, upon the evidence, all the damage which it tended to show was due in part to water which came into the premises through those connections, the plaintiff was not entitled to have the case submitted to the jury.

Verdict for defendant to stand.

Opinion by BAKER, J.

DRENNAN v. GRADY.

Supreme Judicial Court, Massachusetts, January, 1897.

FALLING THROUGH OPEN TRAP DOOR—WARNING—NEGLIGENCE FOR JURY.—Where a customer in a saloon alleged that after buying a glass of beer he retired to the water-closet provided for customers, and on returning to the saloon fell through an open trap door leading to the cellar and was injured, and the barkeeper alleged that the customer was warned of the danger, the question of negligence was for the jury.

ACTION for personal injuries received by plaintiff due to alleged negligence of defendant. Exceptions by defendant from Superior Court, Suffolk county, on refusal to rule that plaintiff could not, upon the evidence, recover.

Plaintiff, in April, 1894, entered defendant's saloon for the purpose of attending to a call of nature, and having bought a glass of beer retired to the water-closet provided for customers, and on returning to the saloon fell into a trap-door, which had been opened in his absence, but which fact was not known to him. Evidence was given by one of defendant's barkeepers that he had called out to plaintiff to warn him of the opening, but it appeared that plaintiff, who was about sixty-five years of age, was quite deaf and did not hear the warning. Evidence was also given that the water-closet was for the use of customers, and that plaintiff had been in the habit of going into defendant's place of business.

SHERMAN L. WHIPPLE and GEORGE A. SALTMARSH, for plaintiff.

OWEN J. GALVIN and JAMES F. SWEENEY, for defendant.

FIELD, C. J.—There was evidence for the jury that the plaintiff was more than a mere licensee. There was evidence that the water closet and urinal were provided for the use of the customers of the defendant, and that the plaintiff was a customer. On the evidence, the questions of the due care of the plaintiff and of the negligence of the defendant were rightly left to the jury. *Hendricksen v. Meadows*, 154 Mass. 599.

Exceptions overruled.

DOLAN V. ATWATER ET AL.

Supreme Judicial Court, Massachusetts, January, 1897.

DUMPING COAL—RISKS OF EMPLOYMENT.—Where a servant of defendant, while unloading coal, was struck on the head by one of the coal tubs while it was being raised, due, as alleged, to defective appliances, but there was evidence that such an accident was liable to occur, whether the latches which fastened the tub were loose or tight, defendants could not be held liable, and plaintiff, an experienced coal shoveler, being aware of these facts, assumed the risks of employment.

EXCEPTIONS by plaintiff from Superior Court, Bristol county.

Action to recover damages for injuries sustained by plaintiff while engaged in shoveling coal at defendant's wharf. Verdict for defendants. The facts sufficiently appear in the opinion.

J. W. CUMMINGS and E. HIGGINSON, for plaintiff.

JACKSON, SLADE & BORDEN, for defendants.

BARKER, J.—The only thing which the plaintiff contended was a defect was that the latch on the tub was a little looser than the latches on the other tubs in the yard. But he testified that tubs with latches as loose were in common use, and it did not appear that the looseness of the latch which he contended was defective came from wear or breakage, but, on the contrary, that it had long been in use in the same condition as on the day of the accident. While the plaintiff testified that tubs with tight latches would not dump on striking a bulkhead, and a tub with a loose latch would, the only other witness called by him testified that it made no difference, that one latch worked with him just the same as the other, and that a tight latch would dump the same as a loose latch; and, upon still further questioning by the plaintiff's attorney, said that he did not know whether a tub with a loose latch would dump quicker or not. In our opinion, there was not sufficient evidence to justify a finding that the defendants were at fault.

The plaintiff had been a coal shoveler for fifteen years, and was entirely familiar with the fact that the tubs, by striking the bulkhead or apron, were liable to be unlatched, and to dump the coal back into the hatchways of the vessel, and he testified that tubs with latches like those on this one were used in other yards only when the coal had been so far removed from the hold that workmen in it could get out of the way. There were but two tubs in use on the morning of the accident. They were where he could examine them without interfering with his work; and their condition, and the fact

that the hold was so full of coal that, if a tub should strike and dump, he could not get out of the way, were obvious, and must have enabled him, with due care, to have fully appreciated the risk that the tub which was in use on the other side of the hold, and which had gone up and down forty or fifty times while he was at work, might dump coal upon him while the hold was so full that he could not get out of the way.

Exceptions overruled

REAGAN V. BOSTON ELECTRIC LIGHT COMPANY.

Supreme Judicial Court, Massachusetts, January, 1897.

INJURED BY ELECTRIC WIRE WHILE REPAIRING ROOF.—Where a person while rightfully engaged in repairing a roof comes into contact with a live electric light wire belonging to defendant, and is injured by the shock received, the question of contributory negligence was for the jury.

LIABILITY FOR NEGLIGENT ATTACHMENT OF WIRE TO ROOF.—Although defendant had contracted with the owner, in return for the privilege of attaching its wires, to execute all necessary repairs to the roof, that fact does not deprive the owner of the right to send workmen to repair it, and if a workman is injured by the negligence of defendant in attaching its wires the defendant is liable.

EXCEPTIONS by defendant to verdict for plaintiff in Superior Court, Suffolk county. Plaintiff, while engaged in making repairs upon a roof was injured by a live electric light wire, which, it was alleged, had been negligently attached to the roof by defendant.

M. W. BRICK and BOARDMAN HALL, for plaintiff.

EVERETT W. BURDETT and CHARLES A. SNOW, for defendant.

It was held to be somewhat doubtful whether there was sufficient evidence of due care on the part of plaintiff, but, on the whole, it was a question for the jury (1). There was abundant evidence that the plaintiff was on the roof for the purpose of doing work for the owners of the building. He was in the employ of Smith & Howard, who were employed by one McLaughlin, who had a contract with the owners to make alterations and repairs upon the building, including the roof. If the work the plaintiff was doing was not within the contract, there was evidence that the agent of the owners had

1. Citing *Griffin v. Electric Light Co.* 164 Mass. 492; *Illingsworth v. Electric Light Co.* 161 Mass. 583.

requested McLaughlin to have this work done. This was evidence that the plaintiff was rightfully on the roof, by an invitation which came mediately from the owners, and was engaged in work on the building for their benefit and at their request. (1) It was contended by defendant that the effect of the contract of the Brush Electric Light Company, to whose obligations the defendant had succeeded, was such that the defendant was bound to repair the roof. If this be so, still the owners of the building could repair the roof if they chose. The defendant was not the lessee or the occupant of the roof. It had the right, undoubtedly, while the contract continued in force, to enter upon the roof, for the purpose of doing everything which it was required to do by the contract, but this right did not exclude the owners from making such repairs upon the roof as they thought necessary. Whether the repair of the gutter which the plaintiff was engaged in making was a repair of the roof, within the meaning of the contract, need not be determined. If it be so regarded, still the charge of the presiding justice upon the effect of the contract upon the duty of the defendant towards the plaintiff was sufficiently favorable to the defendant.

Exceptions overruled.

Opinion by FIELD, CH. J.

DE WHIRST V. BOSTON AND MAINE RAIL-ROAD.

Supreme Judicial Court, Massachusetts, January, 1897.

EMPLOYEE KILLED BY FALLING FROM TRAIN—EVIDENCE MUST SUSTAIN ALLEGATION.—There can be no recovery for the death of a person working on a railroad, where there is no evidence to support the allegation that the engineer of a train stopped the train without being signalled to do so, thereby causing the plaintiff's intestate to fall from the car, or evidence to show how the accident occurred.

EXCEPTIONS from Superior Court, Essex county. The action was brought by plaintiff to recover damages for the death of his intestate caused, as alleged, by the negligence of the servants of the Boston & Maine Railroad. The court below directed verdict for defendant. **Exceptions** by plaintiff.

B. B. JONES, T. F. CARNEY and B. F. BRICKETT, for plaintiff.
LINCOLN & BADGER, for defendant.

1. Citing *Griffin v. Electric Light Co.* 164 Mass. 492.

The plaintiff contended that the accident was due to the negligence of the engineer in stopping the train before he had received the motion to do so. A man who was on the car next the engine gave the only evidence bearing on the matter, and his testimony was to the effect that he thought the steam was shut off "because it jarred me just as I was giving the motion before I gave it" (referring to the signal to stop). Neither the engineer, nor the fireman, nor the conductor, who was in the cab of the engine, was called as a witness. Even if it was assumed that the train was beginning to stop before the signal was given, there was no evidence to connect the accident with this conduct on the part of the engineer, and plaintiff failed to sustain the allegation of negligence.

Exceptions overruled.

Opinion by MORTON, J.

O'NEAL v. O'CONNELL.

Supreme Judicial Court, Massachusetts, January, 1897.

EMPLOYEE INJURED WHILE AT WORK—EVIDENCE—CHARGE.—It is not error to refuse to single out one fact in the evidence, in an action for personal injuries sustained by a person while in the employ of another, and give that fact a prominence which might mislead the jury; the case was properly submitted on all the evidence.

EXCEPTIONS from Superior Court, Suffolk county. Action for personal injuries sustained by plaintiff while working in defendant's sewer trench. Judgment for defendant. Exceptions by plaintiff.

Plaintiff was engaged in laying a pipe in a trench, and, while so engaged, about one-half of a cart load of dirt fell from the lower part of the trench upon the legs of plaintiff and injured him. Negligence was alleged and evidence was offered that the day previous to the accident a small part of the trench fell in and that plaintiff refused to work the next day until assured by defendant that the trench was safe.

ARTHUR H. RUSSELL and WILFRED BOLSTER, for plaintiff.

JOHN F. CRONAN, for defendant.

LATHROP, J.—This is not a case where the only evidence before the jury was the fact that an accident had taken place, and we have no occasion to consider to what extent the rule of *res ipsa loquitur* is applicable to the case of an injury to a servant while engaged in the digging of a trench. This court has gone no further in a case of this kind than to say that, where the accident is of a

kind that is commonly preventable by the exercise of ordinary care, the accident itself, in connection with the circumstances shown in regard to the depth of the trench, and the slope of its sides, and the distance of the braces from each other, furnishes evidence from which the jury might have found negligence on the part of the foreman in charge of the work." *Hennessey v. City of Boston*, 161 Mass. 502. In the case at bar all the facts were before the jury. At the close of the charge, the request was made that the fact that earth fell out was some evidence of negligence. We are of opinion that the judge was not bound to single out one fact, and give that a prominence, which might have misled the jury, and that he was right in submitting the case to the jury over all the evidence. *Car-mody v. Gaslight Co.*, 162 Mass. 539.

Exceptions overruled.

TISDALE v. TOWN OF BRIDGEWATER.

CLARK v. THE SAME.

GILLESPIE v. THE SAME.

Supreme Judicial Court, Massachusetts, January, 1897.

EXCAVATION IN SIDEWALK — NEGLIGENCE OF TOWN FOR JURY TO DECIDE.— Where a person, while driving, is injured by reason of a horse becoming frightened and backing into an excavation in the sidewalk, it is for the jury to determine whether the town was negligent in failing to keep the sidewalk in proper condition, and verdict and judgment for plaintiff would not be disturbed.

THREE actions, brought, respectively, by Marion K. Tisdale, by Alice L. Tisdale, by Julia Clark, by Helen P. Gillespie, and by Charles E. Tisdale against the town of Bridgewater, for injuries resulting from the same cause of action. Verdicts were rendered in the Superior Court, Plymouth county, for plaintiffs, and defendant excepted.

L. E. CHAMBERLAIN, for plaintiffs.

HOSEA KINGMAN, for defendant.

The facts of the case appear from the following report of the evidence: "At the trial there was evidence tending to show that at the place where the accident happened, there was a good, hard, smooth, gravel roadbed, thirty-seven feet wide, from the inner edge of the sidewalk; that the sidewalk on the west side of said street was between seven and eight feet wide, and made of gravel or coal

ashes, slightly raised above the gutter; that between the roadbed and sidewalk there was no curbing, but a little bank of grass had grown up between the traveled portion of the sidewalk and the gutter; that west of the west line of that sidewalk, and at a distance therefrom varying from nearly two feet to eight feet, was a cellar-hole, upon land of one Nathan Willis, from three and one-half feet to four feet four inches deep, measuring from the level of the sidewalk; that the surface of the land from the west line of the sidewalk to said cellar-hole was grassed over, and in places was slightly higher than the sidewalk, perhaps an inch or two; that the place where the accident occurred was about 200 feet from and north of Central Square, which is the business center of the town,—the buildings in the vicinity of the square, especially on the north side, being compact; that on the 22d day of January, A. D. 1894, the female plaintiffs were riding in a carriage, drawn by a horse (which said horse and carriage were the property of the male plaintiff), along said street, traveling north; that the horse was trotting along near the middle part of the street wrought for team travel, and nearly opposite said cellar-hole; that another team passed them at that moment, and, just as it passed, the driver struck his horse with a whip; that immediately plaintiff's horse began to back, and backed rapidly into this cellar-hole, at a place about four feet from the street line, being a steep slope; that, when the plaintiffs were assisted from the team, the rear end of the carriage was in the hole, the forward wheels just west of the outside edge of the sidewalk, the horse standing across the sidewalk, and the plaintiff Mrs. Alice Tisdale, the driver, holding the horse with the reins tight, that the female plaintiffs were injured, and the carriage and horse belonging to the male plaintiff damaged. There was also evidence tending to show that there was no fence or other barrier along the westerly line of said sidewalk against said cellar-hole."

BARKER, J.—The cellar-hole, where the rear end of the carriage went into it, was only four feet from the line of the street, and only twelve feet from the carriage path, while a part of the hole was still nearer,—less than two feet from the street line. The horse, startled by a whip with which the driver of a passing team struck his own horse, backed suddenly, but was stopped with the rear end of the carriage in the hole, the forward wheels just outside the edge of the sidewalk, and the horse standing across the sidewalk. It was not an instance of straying from the highway; and, as the instructions given were not objected to, we must assume that the jury found that the occurrence was one which might reasonably be expected to happen with a horse fit to drive, but momentarily frightened,

that there was but momentary loss of control, that the cellar-hole exposed to danger a team properly traveling over the part of the road wrought for carriage travel, and that the accident would have been prevented by a suitable railing. There is no doubt as to the test to be applied, which is whether there was a dangerous place so near the line of travel that travelers were likely to be injured by it while using the way for travel. None of our decisions have held an excavation or sharp descent so near a street not sufficiently near to permit a finding that the absence of a railing was a defect. In *Logan v. City of New Bedford*, 157 Mass. 534, the bank wall was between five and six feet from the street line and connected two houses twenty or twenty-five feet apart, while there were steps projecting from the houses to the street line, and the wall itself was back of the house fronts. In the present cases, in the opinion of a majority of the court, it cannot be said, as matter of law, that, in the view of the evidence most favorable to the plaintiff, the risk was so small that it would be unreasonable to require the town to provide a railing. *Scannal v. City of Cambridge*, 163 Mass. 91.

Exceptions overruled.

WILCOX v. ZANE.

Supreme Judicial Court, Massachusetts, January, 1897.

INJURED ON ROOF OF HOUSE—LANDLORD AND TENANT.—Where a person, boarding with a tenant of defendant, at the request of the tenant, went upon the roof of a house to work, and while so engaged was injured by reason of a defective board, the defendant was liable for such injury, and the facts as to negligence were for the jury to determine.

EXCEPTIONS from Supreme Judicial Court, Suffolk county. At the trial a verdict was directed for defendant and plaintiff excepted. The facts appear in the opinion.

E. O. SHEPARD, for plaintiff.

ELDEN, WAIT & WHITMAN, for defendant.

KNOWLTON, J.—The evidence tended to show that the roof where the plaintiff was injured was retained in the possession of the defendant as a place to be used in common by his tenants in the building for hanging clothes to dry, and for other uses to which the yard of a dwelling-house is commonly put. It was, therefore, his duty to keep it in a reasonably safe condition for the uses for which it was intended. *Looney v. McLean*, 129 Mass. 33; *Marwedel v.*

Cook, 154 Mass. 235, 28 N. E. Rep. 140; *Watkins v. Goodall*, 138 Mass. 533; *Miller v. Hancock* (1893), 2 Q. B. 177 (1). The plaintiff was a boarder with Mrs. Pray, one of the defendant's tenants, who, by contract with the defendant's agent, had a right to use the roof in common with others. At Mrs. Pray's request, she went upon the roof to do work for Mrs. Pray, which she had a right to do there under her contract with the defendant. Although she was working gratuitously, she was, in a sense, a servant or agent of Mrs. Pray, and she went upon the roof in Mrs. Pray's right. *Barstow v. Railroad Co.*, 143 Mass. 535, 536, 10 N. E. Rep. 255. The use which the tenants might make of the roof was not limited to working there in person. The implied invitation growing out of the defendant's contract extended to the agents and servants of the tenants who went upon the roof to do work which the tenants were authorized to do there. The defendant had an interest in the use to which the roof was being put, for he received pay from his tenants for the privilege of so using it. Upon the evidence in this case the defendant owed the plaintiff the same duty to have the roof reasonably safe at the time of the accident that he owed to Mrs. Pray. *Plummer v. Dill*, 156 Mass. 426, 31 N. E. Rep. 128; *Hart v. Cole*, 156 Mass. 475, 31 N. E. Rep. 644. There was evidence from which the jury might have found that he failed in the performance of this duty. It is clear that it was not necessary to have a very strong floor, for, if one broke through it, his foot could not descend more than about four inches before it would be stopped by the roof below. As the danger of injury was small if a board broke, a greater risk of breaking was allowable than if a break would be likely to be attended by serious consequences. But there was evidence

1. In *Miller v. Hancock* (Eng. Court of Appeal, June, 1893) L. R. 2 Q. B. Div. 177, the facts were as follows: Defendant was the owner of a building in the city of London, the different floors of which were let by him separately as chambers or offices, the staircase, by which access to them was obtained, remaining in the possession and control of defendant. The plaintiff, who had in the course of business called on the tenants of one of the floors, fell, while coming down the staircase, through the worn and defective condition of one of the stairs, and sustained personal injuries. Plaintiff sued defend-

ant to recover damages for such injuries and recovered judgment. *Held*, that there was by necessary implication an agreement by defendant with his tenants to keep the staircase in repair, and, inasmuch as defendant must have known and contemplated that it would be used by persons having business with them, there was a duty on his part toward such persons to keep it in a reasonably safe condition, and the action was therefore maintainable. Application by defendant for judgment or new trial was denied. Opinion by Lord Esher, M. R.; Bowen, L. J., and Kay, L. J.

that the board which broke was badly decayed, and was cross-grained and knotty, and that no repairs had been made on the roof for more than two years. We think that the pieces of broken board which were in evidence, the photographs, and the testimony of the witnesses, presented a question for the jury on this branch of the case. We cannot say, as matter of law, that there was no evidence that the plaintiff was in the exercise of due care. She testified that she had never noticed the dangerous condition of the roof at the place of the accident, and she was in the performance of her duty in the usual way. She had no such duty to observe the condition of the roof in regard to safety as the defendant had.

Exceptions sustained.

LEMERY v. BOSTON AND MAINE RAILROAD COMPANY.

Supreme Judicial Court, Massachusetts, January, 1897.

EMPLOYEE INJURED ON TRAIN—DEFECTIVE RAIL—OFFER OF EVIDENCE.—Where plaintiff, an employee of defendant, was injured while riding upon one of defendant's cars, and being required to specify the negligence on which he relied, an offer to prove that four cars had been cut off or detached from the rear end of a freight train, and the car immediately ahead of that upon which he was riding was derailed, and also the car upon which he was riding, whereby he was thrown to the ground and injured; that he was in the exercise of due care; that the cars did not run so smoothly upon the side track as upon the main tracks; that the train was not running at an unusual or improper speed; that other cars had been derailed at the place of the accident and that the track had not been repaired, was sufficient to entitle plaintiff to put in his evidence, as plaintiff did not rely solely upon the accident, but offered to prove other facts tending to show a defective road.

EXCEPTIONS from Superior Court, Suffolk county.

S. A. FULLER, for plaintiff.

SOLOMON LINCOLN, for defendant.

At the trial below there was a verdict for defendant and plaintiff excepted, but not being allowed, he filed a petition to prove the same. The facts of the case are substantially as follows: The declaration was in two counts — the first being at common law, and the second under the employers' liability act. The first count alleged that plaintiff was working in the employ of defendant, and was riding upon a car which had been switched off the main track

onto a track known as the "D'Estey Track," and, while so riding and working, "by reason of the negligence of the defendant, its agents, officers or servants, who were not the fellow-servants of the plaintiff, said car on which he was working jumped the track, to wit, the D'Estey track, near or at a frog," etc. The second count added an averment "that said car jumped the track as aforesaid by reason of a defect in the ways, works and machinery of the defendant, which arose from or had not been discovered or remedied, owing to the negligence or carelessness of some person in the employ of the defendant corporation, and intrusted by it with the duty of seeing that the ways, works, and machinery were in a proper condition." Plaintiff was directed to specify the negligence on which he relied; and having stated that he was unable to state, with any more precision than he had done in his pleadings, the cause of the accident, because he lost his arm, and was immediately removed from the place of the accident, he offered to prove that four cars had been cut off or detached from the rear end of a freight train, and were moving down the D'Estey track, and the car immediately ahead of that upon which he was riding left the D'Estey track, and was derailed, as also the car upon which he was riding, whereby he was thrown to the ground and hurt; that he was in the exercise of due care, and that no fellow-servant of his contributed to the car's jumping the track at the frog described in the declaration; that upon the D'Estey track, described in the declaration, the cars did not run so smoothly as they did upon the main tracks; that the train was running at a rate of speed which was not unusual or improper; that, before the accident, cars had jumped the track at the same place, and the track had not since been fixed and repaired; and that the ballasting or grading of the track was not so good as upon the main track. From this offer it was sufficiently plain that plaintiff relied on the ground that the railroad was defective at the place of the accident. The offer of proof of these facts in connection with the happening of the accident, was enough to entitle plaintiff to put in his evidence.

Exceptions sustained.

Opinion by ALLEN, J.

**LONIS v. LAKE SHORE & MICHIGAN SOUTHERN
RAILWAY COMPANY.**

Supreme Court, Michigan, January, 1897.

ACCIDENT AT RAILWAY CROSSING—SIGNALS NOT GIVEN—NEGATIVE TESTIMONY.—In an action for injuries sustained in a collision, between a wagon in which the plaintiff was riding and a train at a crossing, where five witnesses for the plaintiff swore positively that the whistle was not blown nor the bell rung, and one other witness that the train did not blow the whistle or ring the bell, but his attention was not called directly as to whether the bell was rung or whistle was blown, and eighteen witnesses for the defendant testified positively that the signals were given, there was not negative testimony to which an instruction was applicable that the difference between the positive and negative testimony was so marked as to cause the jury to find that the testimony of witnesses who had an opportunity to know that the signals were given should outweigh the testimony of witnesses who did not hear it unless in some manner their attention had been called to it.

APPEAL from judgment of Circuit Court, Lenawee county, in favor of Minor Lonis, plaintiff, against defendant.

C. E. WEAVER (GEO. C. GREENE and O. G. GETZEN-DANNER, of counsel) for appellant.

WATTS, BEAN and SMITH, for appellee.

This case is the companion of *McDuffie v. Lake Shore & M. S. Ry. Co.*, 98 Mich. 356. McDuffie was driving and Lonis was riding in the same wagon with him. The issue in this case is the same as in the other. The court held in that case that the conflict between the statements made by McDuffie and Lonis just after the accident, and their testimony on the trial, was not so great as to justify the court in directing a verdict for defendant on the ground of contributory negligence. The court holds the same way in this case. The jury were properly left to determine what credence was to be given to those parties. The further ruling of the court is stated in the syllabus.

Judgment affirmed.

Opinion by GRANT, J.

SHADFORD v. ANN ARBOR STREET RAILWAY COMPANY.

Supreme Court, Michigan, January, 1897.

MASTER AND SERVANT—FURNISHING SAFE APPLIANCES.—An employer is not liable for injuries to an employee alleged to have been occasioned by the failure of the employer to furnish tools of the latest device or pattern, when the tools furnished were such as was in common use in similar work.

EVIDENCE.—Where there was no evidence that a certain appliance was not in general use in similar employments, it was error to submit the question to the jury.

APPEAL from judgment of Circuit Court, Washtenaw county, in favor of John H. Shadford, plaintiff, against defendant.

ISSAC N. PAYNE (ROBERT YOUNG, of counsel) for appellant.

A. J. SAWYER, for appellee.

On September 29, 1894, plaintiff, who was about twenty-three years of age, was engaged in constructing a curve in the trolley wire of defendant's street railway equipment in the city of Ann Arbor. He stood on a platform about fourteen feet above the ground. The platform had a railing about two feet high on three sides. Plaintiff was endeavoring to fasten a guy wire to the trolley wire in order to produce the necessary curve. He used a head vise to which was fastened a strap. The vise was secured to the guy wire, the strap thrown over the trolley wire, and the trolley wire drawn into position. The plaintiff then attempted to fasten the slack of the guy wire into the goose-necks attached to the trolley wire. To do this he passed under the trolley wire and into the inside of the curves made by that wire. He put one arm over the trolley wire. At this instant the vise failed to hold the guy wire, the trolley wire was violently released, and the plaintiff was hurled to the ground, sustaining injuries from which he has never recovered. The plaintiff recovered a verdict and judgment in the lower court. Defendant brings error.

Plaintiff contended on the trial that the railing was too low, that the hand vise was an improper and unsafe tool and that a device known as a "come along" should have been used.

But one question need be considered, as the evidence was conclusive that the vise was in no way defective, and that is whether the tool was such as was in general use in like employments.

Employers are not bound to insure absolute safety of machinery or appliances or to furnish the newest or best. *Railroad Co. v. McDade*, 135 U. S. 554; *Sisco v. Railway Co.*, 145 N. Y. 296 (1).

It is shown without contradiction that other street railways, as well as telephone and telegraph companies, used the same device, and it was error for the court to submit the question as to whether other companies used the device. There is no evidence in the case that the vise was not so used. The rule in this State is that an employer is not responsible for failure to discard what is not the safest known appliances. *Railroad Co. v. Gildersleeve*, 33 Mich. 133. See, also, *Railroad Co. v. Bayfield*, 37 Mich. 205; *Richards v. Rough*, 53 Mich. 212; *Sjorgren v. Hall*, 53 Mich. 274; *McGinnis v. Bridge Co.*, 49 Mich. 469; *Smith v. Potter*, 46 Mich. 259; *Piquegno v. Railway Co.*, 52 Mich. 44. Judgment should have been directed for defendant.

Judgment reversed.

Opinion by LONG, C. J.

DAVIDSON v. CITY OF MUSKEGON.

Supreme Court, Michigan, January, 1897.

PERSONAL INJURY CLAIM AGAINST MUNICIPAL CORPORATION BY INFANT.—The provision of section 20, title 6, of the Muskegon city charter, that all claims for damages for negligence of said city shall be presented to the common council within six months after the claim has arisen or it is barred, applies to claims for personal injuries and to infants as well as adults.

APPEAL from judgment of Circuit Court, Muskegon county, in favor of defendant in action by Ida Davidson for personal injuries.

1. "The employer does not undertake with the employee that he will use the very best appliances. * * * The master is not to be cast in damages for error of judgment in selecting one method of prosecuting his business, or one kind of machinery or appliances on proof that another is better or safer when both are in common use. Proof that it was dangerous is not enough," citing *Frace v. Railroad Company*, 143

N. Y. 182; *Flinn v. Railroad Company*, 142 N. Y. 11; see, also, *Titus v. Railroad Company*, 136 Pa. St. 618; *Kehler v. Schwenk*, 144 Pa. St. 348; *Railroad Co. v. Allen's Adm'r*, 28 Am. & Eng. Ry. Cases, 514; *Hosie v. Railway Co.*, 75 Iowa, 683; *Vinton v. Schwab*, 32 Vt. 614; *Railroad Co. v. Coleman*, 28 Mich. 449; *Hogan v. Railroad Co.*, 86 Mich. 615.

EDWARD D. HAINES (JOSEPH H. CLARK, of counsel), for appellant.

H. L. DELANO, for appellee.

Plaintiff brought suit for injuries received by her on a defective sidewalk on August 21, 1892. She was then an infant and did not attain her majority until February 1, 1894. On March 15, 1894, she presented to the common council a claim in writing, duly verified, for damages and again on July 3, 1894. Section 20 of title 6 of the charter of the city of Muskegon provided that no claim or contract should be audited by the common council unless it was accompanied by an affidavit that the claim was just, etc., "and all claims for damage against the city growing out of the negligence or default of said city or of any officer or employee thereof shall be presented to the common council of said city in the manner above provided within six months after such claim shall arise, and any default thereof shall thereafter be forever barred." The claim not having been filed within six months from the date of the injury, the action cannot be maintained. *Springer v. City of Detroit*, 102 Mich. 300; *Morgan v. City of Des Moines*, 54 Fed. 456, and *Id.* 8 C. C. A. 569. To hold otherwise would render the provision in the charter of Muskegon nugatory. The case of *Lay v. City of Adrian*, 75 Mich. 444, does not apply. It was competent for the legislatures to pass an act putting adults and minors on the same footing, and such would be the legal effect of a statute which contained no saving clause exempting infants from its operation.

Judgment affirmed.

Opinion by MOORE, J.

BAKER v. CITY OF GRAND RAPIDS.

Supreme Court, Michigan, January, 1897.

INJURY TO PEDESTRIAN FALLING INTO EXCAVATION IN STREET.—

Where there was evidence that a boy, fifteen years of age, while on an errand in the night time and attempting to cross a street in a diagonal direction, fell into an excavation for a sewer and was injured, the city was liable, and it was no defense that the work was being done by a contractor.

APPEAL from judgment, Superior Court of Grand Rapids, in favor of plaintiff in action by Fred. J. Baker, by next friend, against defendant for personal injuries.

HENRY J. FELKER (TAYLOR and EDDY, of counsel), for appellant.
McKNIGHT & McKnight, for appellee.

In 1890, the defendant city contracted with one Tennis to construct a sewer in the center of South Lafayette street, together with manholes and catch-basins, which latter were located between the gutter and sidewalk and were seven feet four inches deep with a diameter of five feet four inches. The plaintiff, a lad fifteen years of age, on the evening of November 17, 1890, while on an errand and crossing Lafayette street in a diagonal direction, fell into this opening, and was injured.

Testimony was introduced that it was customary for people to cross the street in the direction taken by plaintiff and that a path had been worn across the street at this point. Plaintiff had the right to cross the street at any portion of the traveled way. *Thomp. Neg. sec. 387; Lincoln v. City of Detroit*, 101 Mich. 245, 59 N. W. 617. The fact that others took the same course bore on question of plaintiff's care.

Testimony was introduced that when the men quit work barriers were placed around the hole and a lighted lantern left there. Two witnesses testified that immediately after the accident they attempted to light the lantern, but it would not stay lighted, because of lack of oil. If it was a duty to leave a light, it was not performed by leaving a lantern with insufficient oil.

The plaintiff was not guilty of contributory negligence. The public streets are intended for travel in the evening as well as in the day time, and it is not negligence to attempt to travel the public streets in the evening.

The rule is that a city, when performing a duty imposed upon it by law, cannot shift the responsibility for conditions created by itself in the performance of such duty upon a contractor and rid itself of its obligations. *Covey v. City of Detroit*, 9 Mich. 164; *Southwell v. City of Detroit*, 74 Mich. 438, 42 N. W. 118. See *Hayes v. City of West Bay City*, 91 Mich. 418, 51 N. W. 1067. See, also, *Brusso v. Buffalo*, 90 N. Y. 679; *Dillon's Mun. Corp.* (4th ed.) 5, 1027 and note.

Judgment affirmed.

Opinion by MONTGOMERY, J.

GAHAGAN v. AEROMETER COMPANY (1).

Supreme Court, Minnesota, January, 1897.

RESPONDEAT SUPERIOR.—In determining whether the doctrine of *respondeat superior* applies, the test is, whether, with reference to the matter out of which the alleged wrong sprung, the person sought to be charged had the right under the contract of employment to control, in the given particular complained of, the action of the person doing the wrong.

DAMAGES.—The injury to a boy between eight and nine years of age, of mangling his ring and middle fingers on his left hand so as to require their amputation at the first joint, will not warrant a jury to render a verdict of \$1,800 in the absence of evidence of special or peculiar damage.

APPEALS from judgments of District Court, Fillmore county, in favor of plaintiffs, in actions by Connor Gahagan and Cornelius Gahagan, by Connor Gahagan, his guardian.

W. E. TODD and J. D. GIFFEN, for appellant.

JOHN A. LOVELY and J. Q. FARMER, for respondents.

These actions were brought by the respective plaintiffs to recover damages caused by the negligence of the defendant — the one by the infant, for personal injuries to himself, and the other by his father, for loss of his son's services resulting from the same injuries. Both actions were tried together, and resulted in verdicts for the plaintiffs in favor of the infant for \$1,800 — and in favor of the father for \$400. The negligence charged was the erection and leaving unguarded in a public street, a windmill, calculated to attract the attention and invite the interference of young children, ignorant of the dangers to which the cogwheels and gearing exposed them when the mill was set in motion by the wind. The evidence showed that one Frankson, assisted by one Conklin, set the mill up, and no point is made but that the jury were justified in finding that they were guilty of negligence. The question in the case was and is whether the doctrine of *respondeat superior* applies to the relation between the defendant and Frankson, so as to make the former liable for the negligence of the latter. Frankson had an "agency contract" with the defendant, by the terms of which he was to sell its mills. He was to sell on commission, and the contract left him free to carry on the business in his own way. But the last clause of the first paragraph will not reasonably admit of any other construction than that Frankson was to be governed by any instructions

1. Decision rendered in two actions between these parties.

which the defendant might give as to the manner in which the business should be conducted. If the setting up of such a mill was within the scope of his agency, and if in that particular the defendant had the right to control his action, it is wholly immaterial whether it knew either of his setting it up or expressly directed him to do so. If the defendant had, under its contract with Frankson, the right to control his action in the matter of setting up sample mills, then it is liable for his negligence. Under the evidence this was a question for the jury. We think the verdict for \$1,800 was excessive. The boy lost the first joint of the ring finger and the first joint of the middle finger. On this basis what would he have been entitled to for the loss of a leg or arm? It is evident that it would amount to a sum far beyond what any court would approve as within reason.

Ordered, that the order be reversed unless plaintiff consents to reduction of verdict to \$1,200, in which case, affirmed.

Opinion by MITCHELL, J.

JOHNSON v. ST. PAUL CITY RAILWAY COMPANY.

Supreme Court, Minnesota, January, 1897.

INJURED WHILE RIDING ACROSS CAR TRACK BY COLLISION WITH MOTOR CAR.—Where plaintiff was injured while riding in a carriage driven by another across defendant's track by a motor car colliding with the carriage, the finding of the jury that the accident was due to the negligence of those in charge of the car was proper.

DAMAGES.—The damages awarded, \$4,000 for injuries to an aged female, were excessive.

APPEAL from District Court, Ramsey county, by defendant in action by Sarah S. Johnson against St. Paul City Railway company.

MUNN, BOYESON & HUGGESON, for appellant.

DANIEL W. DOTY, for respondent.

The plaintiff was riding in a funeral procession in a carriage driven by and in the control of her daughter-in-law. The carriage was near the rear of the procession, and while it was crossing the railway track of the defendant, it was struck by one of the defendant's motor cars and the plaintiff was injured. The fact that plaintiff was not responsible for the driver's negligence will not relieve her from responsibility for her own negligence. *Howe v. Railway Co.*,

62 Minn. 71, 64 N. W. 102. Assuming the plaintiff's version of the facts, that the carriage was following the funeral procession, and crossing the tracks in the center of the crossing where most of the carriages had just crossed, there was nothing to suggest special or extraordinary vigilance, but, on the contrary, everything to make plaintiff feel, as she says, perfectly safe. The age of the plaintiff is also to be kept in mind. All that the law requires of an infant is a degree of care commensurate with its age. We think the same rule should apply to old people. Suppose we accept as true the statements of defendant's witnesses, that the driver of the carriage turned up Broadway, as if intending to go up that street, without crossing the car tracks, and then suddenly turned the horse on the tracks within a few feet of the approaching car. There is no evidence that plaintiff directed this or knew in advance or in time to prevent it, that the driver intended to do this. The same fact that would have justified the motorman in assuming that the driver was going to continue her course could certainly have justified the plaintiff in indulging in the same assumption. The injury consisted of a fracture of one of the bones on the outer side of the left ankle and the tearing of the lateral ligaments of the ankle, and injury to the joint. The nature or extent of the injury to the joint does not appear. She suffered great pain and was confined to her bed for three months, requiring constant care. She still suffers pain. The jury awarded her \$4,000.

Remembering that the plaintiff was between seventy-five and seventy-six years old, we think the verdict was excessive and a new trial will be granted unless plaintiff files her consent that the verdict be reduced to \$2,500, in which case the order appealed from will be affirmed.

Opinion by MITCHELL, J.

STENDAL v. BOYD.

Supreme Court, Minnesota, January, 1897.

PLEADING—DEMURRER TO COMPLAINT IN ACTION FOR NEGLIGENCE—“TURNTABLE CASES.”—In an action for damages resulting from acts of another alleged to have been negligent, the complaint is not demurrable, as not stating a cause of action, unless the particular acts alleged are such that they could not be negligent under any evidence admissible under the allegation of the pleading.

APPEAL from order of District Court, Ramsey county, overruling demurrer to the complaint in action by Oluf Stendal, as admr., against Allen P. Boyd.

Action for damages for the death of a child of tender years, that was drowned in a pool of standing water on land of the defendant in densely populated part of the city of St. Paul. It is sought to bring the case within the principle of the "Turntable Cases." *Keffe v. Railway Co.*, 21 Minn. 207, and *Railroad Co. v. Stout*, 17 Wall. 657. In *Twist v. Railroad Co.*, 39 Minn. 164, we intimated that the doctrine of the "Turntable Cases" ought not to be extended, but we did not mean that it would not be applied to any but "Turntable Cases."

Order affirmed.

Opinion by MITCHELL, J.

ECKMAN v. LAUER.

Supreme Court, Minnesota, January, 1897.

MASTER AND SERVANT—FELLOW-SERVANT.—The plaintiff, an employee of a contractor for the erection of a church, who sublet the work of tinning, is not a fellow-servant of one employed by the tin contractors and may maintain an action for injuries received through the negligence of the latter employee in causing a horse that he was in charge of to so draw a rope that a platform upon which the plaintiff was at work was upset and the plaintiff injured.

APPEAL from judgment of District Court, Ramsey county, in favor of plaintiff. The facts appear in the opinion.

MORTON BARROWS, for appellants.

SCHOONMAKER, FLEMING & HINTERMISTER, for respondents.

COLLINS, J.—Action to recover for injuries said to have been caused by defendant's negligence. At the trial the court dismissed the action as to defendants Romer and Karst & Breher, and then the plaintiff had a verdict as against defendants (appellants) Lauer Bros. As the case is presented, the only question which needs elaboration is that raised by counsel's contention that the verdict is not supported by the evidence. Defendant Romer had contracted to erect a church in the city of St. Paul, and plaintiff was in his employ, as a carpenter. Romer had sublet the necessary tin work to Karst & Breher, and the stone work to Lauer Bros., reserving to himself all of the carpenter work. When the accident occurred, Lauer Bros. were completing the stone tower or steeple, and for the

purpose of raising the materials, had attached a rope to a small platform, and then run it upwards, about thirty feet, to a block hung at the top of the tower. Passing through this block, the rope descended at an acute angle, when taut, parallel with the plane of the south front of the building, to a stationary block upon the ground, a short distance from the foot of the tower, and about forty feet from the upper block. The rope ran through this stationary block, and to its end a horse was hitched, driven by one of Lauer Bros.' employees. When materials were to be hoisted the horse was driven away from the building, and the platform raised. The horse was backed up when the platform was to be lowered. Naturally, the rope was quite loose when the platform was upon the ground. On the morning of the accident, defendants Karst & Breher put up a scaffold on the side of the building, the walk of which scaffold was a single plank, laid down on brackets. The east end of this plank projected east, beyond the south front of the building, so that, when that part of the rope running at an angle between the block at the top of the tower and the block on the ground was taut, it was about four feet above the plank, and from two to four feet west of the end which projected. When the platform was not in use, and resting upon the ground, the rope running between the blocks dropped loosely upon the plank, or might get underneath it, as it did just before plaintiff received his injuries. Karst & Breher's men were tinning a roof gutter during the forenoon, standing upon the plank, and the driver of the horse was engaged in conversation with them a number of times. Immediately after dinner, plaintiff was directed by Romer's foreman to fit a "slant board" into the same gutter, and went upon the scaffold with another employee, to do the work. Shortly afterwards, the driver hitched the horse to the end of the rope, and then stood immediately under the scaffold until plaintiff notified him to look out, as work was to be done there and something might fall upon him from above. This advised the driver of the presence of plaintiff on the scaffold. It was not shown just where the rope then was, but, from what resulted, it must have been in plain sight of the driver, and lying upon the ground, under the plank, which was also in plain sight. A few minutes afterwards the driver started the horse, and, as the rope was pulled away from the stationary block, it caught the underside of the plank, tipping it over and throwing both men to the ground. Upon this state of the evidence, defendants Lauer Bros. having declined to put in any testimony, the court charged the jury that ordinary care was required of the driver of the horse, and if he failed to observe ordinary care when operating the hoisting

apparatus, taking into consideration the apparent danger to the men he knew were standing upon the plank, he was guilty of negligence for which his employers were responsible, and that if there was no apparent danger, under the circumstances, and ordinary care was exercised by the driver, he was not negligent, and plaintiff could not recover. And in this immediate connection the court further charged that if the jury should find that the driver knew, or, in the exercise of ordinary care, ought to have known, that it was dangerous to operate the apparatus without seeing that the rope was above the plank, knowing as he did that men were standing upon it and in danger of being thrown off, it became his duty to see the position of the rope, and a failure so to do constituted negligence, and plaintiff, without fault on his part, would be entitled to recover of these appellants. The charge was correct. The plaintiff and the driver of the horse were working for independent contractors, were not fellow-servants, and there was sufficient evidence to support the verdict. The question of plaintiff's contributory negligence was also for the jury, upon the facts as above stated.

At the close of the testimony counsel for appellants moved the court to direct a verdict in favor of his clients, and this the court declined to do. He thus brought the case within the provisions of Laws 1895, c. 320. Subsequently upon a settled case, counsel moved for judgment notwithstanding the verdict, and the present appeal is from an order denying this motion. Respondent's counsel have not questioned the appealability of such an order, and we have disposed of the case on its merits. But we do not wish to be understood as holding that such an order is appealable, for it is a debatable question.

Order affirmed.

WEBBER v. ST. PAUL CITY RAILWAY COMPANY.

Supreme Court, Minnesota, January, 1897.

STATEMENT OF INJURED PERSON, IN COLLISION OF STREET CARS, TO PHYSICIAN NOT ADMISSIBLE.—On the trial of an action for the recovery of damages for personal injuries alleged to have been sustained by the plaintiff by reason of the collision of defendant's street cars while the plaintiff was a passenger on one of them, in which action the plaintiff's allegation of negligence resulting in such injuries was denied by the defendant, the plaintiff's attending physician was permitted, against objection, to testify

that four or five days after the time of the injury the plaintiff stated to him "that he was sitting in the back part of the car and did not see this other car that came in collision with this one until it was almost onto them; and that he rose and grabbed hold of a window, and just at that time the car struck and wrenched him around and threw him partly on the floor and partly on the opposite side of the car." *Held, error.*

APPEAL from order of District Court, Ramsey county, granting new trial to defendant in action by John B. Webber, as executor of J. E. Webber, after verdict for plaintiff.

JOHN A. LOVELY, J. F. GEORGE and C. D. O'BRIEN, for appellant.
MUNN, BOYESEN & THYGESON, for respondent.

The plaintiff's testator, John E. Webber, while a passenger upon a street car on November 1, 1893, it is claimed was injured in a collision between the car he was in and another. The action was tried in February, 1895, and a verdict rendered for the plaintiff for \$9,250. Webber was physically unable to be present at the trial, and his deposition could not be taken owing to his mental and physical condition. Motion was made for a new trial, but before the hearing Webber died and John B. Webber was substituted as plaintiff. The only question considered by the court on appeal was the admissibility of the evidence stated in the syllabus. Several physicians for the plaintiff testified that he was suffering from traumatic neurosis, a disease of the nerves, caused by violence, and it therefore became an important factor in plaintiff's behalf to show that he suffered from violence in this collision. There were four or five passengers upon the car, but only one could testify that Webber was injured, and he said that Webber was standing at the lower end of the car, seeming quite pale and sort of dazed; and another witness that saw Webber outside the car after the accident, having a little blood on his handkerchief, but did not know where it came from. Upon this state of the evidence Dr. McCord was permitted, against objection, to give in evidence the statements Webber made to him some four or five days after the accident. This alleged fact was not testified to or contradicted by any witness. The evidence was clearly inadmissible. *Firkins v. Railway Co.*, 61 Minn. 31. A physician can testify to the present physical condition of his patient and what he said as to such condition, but anything in the nature of past events, such as the cause of the injury or sickness, must be excluded. Especially should this rule be applied after several days have elapsed, when opportunity for simulated statements of cause of the injury would be afforded.

Order affirmed.

Opinion by Buck, J.

JOHNSON v. MINNEAPOLIS GENERAL ELECTRIC COMPANY.

Supreme Court, Minnesota, January, 1897.

MASTER AND SERVANT—CHIEF ENGINEER IS NOT FELLOW-SERVANT.—A chief engineer having charge of all the men at work about the plant and giving orders to the exclusion of all others, for two years acted as superintendent, in ordering a workman to help load a boiler on a truck and as such was a vice-principal and not a fellow-servant, and the questions of negligence in an action for injuries sustained by the workman by the boiler-rolling off the truck against him were for the jury.

APPEAL from order of District Court, Hennepin county, granting new trial to plaintiff John G. Johnson.

FLANNERY & COOKE, for appellant.

JOHN M. REES, for respondent.

Plaintiff was in defendant's employ as a laborer, his principal work being in the engine-room as a "wiper." One Wright was chief engineer and had charge of the men employed about the plant, usually twelve in number. In December, 1894, Wright called plaintiff and another man to assist in loading one of a number of heavy boilers upon a truck. Wright directed all the movements of the men. After the boiler was on the truck Wright directed the plaintiff to remove one of the skids used to roll the boiler on the truck and to loosen a rope that had been fastened to the boiler and to a place near by. Plaintiff turned his back to the truck, and had just commenced to unfasten the rope when the boiler rolled off the truck, struck him and caused the injuries complained of. There was plenty of wood lying round that might have been used to block the boiler on the truck, and there was evidence that the earth under the hind wheel on the side where the boiler rolled off was soft, and that Wright knew of the condition of the ground. Wright was the sole representative of the defendant corporation, and had for two years given plaintiff his orders to the exclusion of all other persons. The jury would have been justified in finding that what Wright did on this occasion pertained to his duty of superintendence as a foreman, in which position he represented the defendant as master, and that as such foreman he was a vice-principal. There was evidence that Wright failed to exercise ordinary care towards the plaintiff, in not causing the boiler to be blocked and in ordering the plaintiff to remove the skid and then the rope, both acts to be performed in an

extremely dangerous place. The questions were for the jury. See *Carlson v. Exchange Co.*, 65 N. W. 915; *Abel v. Butler-Ryan Co.*, 68 N. W. 205.

Order affirmed.

Opinion by COLLINS, J.

BROWN v. VILLAGE OF HERON LAKE.

Supreme Court, Minnesota, January, 1897.

STATUTE OF LIMITATIONS IN ACTION FOR PERSONAL INJURIES.—

Laws 1895, chapter 30, amendatory of General Statutes, 1878, chapter 66, section 8 (Gen. St. 1894, sec. 5138, subd. 1), did not operate as a repeal or amendment of section 5136, subdivision 5, wherein it is provided that the six-year statute of limitations shall apply to actions for injuries to the person or rights of another, not arising on obligation and not thereafter enumerated. The amendment falls within the doctrine of *ejusdem generis*, and applies only to actions based upon wrongs of a like nature to those specifically mentioned in section 5138 as it stood originally.

APPEAL from order of District Court, Jackson county, overruling demurrer to answer in action by Leroy Brown against defendant for personal injuries caused by defective sidewalk.

WILSON BORST, for appellant.

L. F. LAMMERS, for respondent.

If by the amendment (Laws 1895, c. 30), to Gen. Stats. 1878, c. 66, sec. 8 (Gen. Stats. 1894, sec. 5138) the right of action set out in the complaint herein is barred by limitation if not brought within two years, the demurrer was well taken, and the order appealed from will have to be affirmed. If, however, the amendment did not have that effect, the right to bring action remains for six years. The latter is the case. The amendatory legislation was aimed at sec. 5138, subd. 1, which fixes the limitation at two years as to specified acts of commission, namely libel, slander, assault, battery, or false imprisonment, and the amendment added the words "or other torts resulting in personal injury." There was not any interference with sec. 5136 in the fifth subdivision, of which the right of action, when the wrong or injury resulted from acts of omission, was limited to six years, and no part of this section was repealed unless by implication, which is not favored. We think if it was intended, the legislature would have repealed or amended the section directly and not left it to inference. The doctrine of *ejusdem generis* should be applied to

sec. 5138 as amended, and the amendment applied only to that class of wrongs of a like nature mentioned in original act.

Order reversed.

· Opinion by COLLINS, J.

HOLLENBECK v. MISSOURI PACIFIC R'Y CO.

Supreme Court, Missouri, Division No. 2, January, 1897.

INJURED WHILE COUPLING CARS—ABSENCE OF CONTRIBUTORY NEGLIGENCE.—Where plaintiff, a brakeman in the employ of defendant, while passing between cars for the purpose of uncoupling, fell into a ditch on the track, and it was shown that it was the rule of the company that employees might so pass while trains were moving slowly, the facts were sufficient to show absence of contributory negligence.

DAMAGES.—Judgment for \$10,000 not excessive for personal injuries where an employee of railroad, thirty-two years old, earning \$65 per month, had his leg crushed, which required three amputations, and made a long stop at hospital necessary.

APPEAL from judgment for plaintiff rendered in Circuit Court, Jackson county.

ELIJAH ROBINSON, for appellant.

O. L. SMITH and L. H. WATERS, for respondent.

The facts are substantially as follows: The accident occurred at a station on the line of defendant's road in the State of Kansas, on February 17, 1892. At the time plaintiff was in the employ of defendant in the capacity of brakeman and baggageman on what is known as a "cut-off," running from Marquette to Gypsum City, in said State, a distance of twenty-seven miles. The train was a mixed train, composed of one passenger coach and a number of freight cars. It left Marquette at 7:41 A. M., and was due to arrive at Gypsum City at 9:05 A. M., thus giving an hour and twenty-four minutes in which to make the run. Besides the side track near the depot at Lindsborg, there is a spur track, used for the purpose of loading and unloading cars. When the train reached Lindsborg, on the morning of the accident, there was a car on the spur track, which was to be taken in the train, and one standing on the main line, or in the train, which was to be left on the spur track. Plaintiff took charge of the train, as is it was his custom to do, and undertook to do the switching. During the switching, it became necessary to move the train north of the point of the spur track, in order to back it in on the main track. When it had gotten far enough north for that

purpose, plaintiff signaled the engineer to back down, and started north to meet the train. Near where he met it there were two depressions in the track, one somewhat larger than the other. He went in between the cars to uncouple them, walked along with the motion of the cars, and, while doing so, stepped in the smaller ditch, fell down, and was run over by the cars and injured. The ditches were dug the latter part of the preceding summer, and were variously estimated by the witnesses to be from four to six inches deep. Plaintiff had been running over this cut-off twice a day for more than a year before the accident, occasionally switching cars at this station, and placing them on and taking them off this spur track. The ditch which caused plaintiff to fall was in plain view. When he met the train, it was then moving from three to four miles an hour. While doing the switching, plaintiff had control of the movements of the train. He testified that he did not know the ditch which caused him to fall was there, before that time; that he had never been over that part of the track; and that it was perfectly safe to go in between cars for the purpose of coupling them, and to walk along with them, and in between them, when only moving at the rate of from three to four miles per hour. On cross-examination he stated that he knew that it was dangerous to go in between cars when they were in motion. The evidence on the part of the defense tended to show that plaintiff had knowledge of the ditch before the accident. Plaintiff was something over thirty-two years of age at the time, and earning \$65 per month. After the injury he was taken by defendant to its hospital, in Kansas City, where his injured limb was dressed by the company surgeons, and the broken bones wired in place. His leg was amputated at the hospital, above the knee, on June 16, 1892. He remained at the hospital for six months.

At the conclusion of plaintiff's evidence, defendant asked an instruction in the nature of a demurrer thereto, which was refused by the court, and exceptions duly saved; and, again, at the close of all the evidence, the same or a similar instruction was asked by defendant, with like result. It is insisted that the instruction should have been given, because: First, there was no evidence of negligence on the part of defendant; second, the plaintiff knew of the existence of the defect in the track, if it was a defect, or had the opportunity to know, and would have known if he had been reasonably careful and observant, and must, therefore, be held to have assumed the risk; third, the plaintiff was guilty of contributory negligence in going between the cars when in motion, there being no necessity for his doing so, and he being aware of the danger.

While a master is not an insurer of the safety of his servant, the law imposes upon railroad companies, as their duty to their employees, to keep their tracks in reasonably safe repair, so as to prevent injury to them; and for failure to do so they are liable for the consequences. *Burdick v. Railway Co.* (Mo. Sup.) 27 S. W. Rep. 453; *Williams v. Railway Co.*, 119 Mo. 316, 24 S. W. Rep. 782. They are not, however, required to furnish tracks that are absolutely safe. While it may be conceded that the mere fact that there was a ditch in the track, and that plaintiff stepped into the same, and was injured, did not make out a case which entitled him to recover judgment against the railroad company, yet when the further facts that the ditch into which he stepped and caused him to fall was from four to six inches deep, if it be true that he had no knowledge of its existence before that time as testified to by him, the rule of the company permitting its employees to go in between the cars when moving at a safe rate of speed, which was shown to be the case at the time of the accident, and that defendant's section foreman having charge of the roadbed at that point knew of the existence of the ditch for several months before the accident, are also taken into consideration, he made out a *prima facie* case, which entitled him to the opinion of the jury. It then devolved upon defendant to overcome this *prima facie* case, and to show that plaintiff was guilty of contributory negligence.

The weight of the evidence tending to show that plaintiff was guilty of contributory negligence in going between the cars when in motion was also for the consideration of the jury, and upon which reasonable minds might well differ. The rule of the company which was read in evidence certainly implies that in coupling and uncoupling cars the employees of the company may go in between the cars for that purpose, when the cars are moving at a slow and safe speed. Experienced railroad men, including the conductor and engineer in charge of the train upon which plaintiff was engaged, both testified that from three to four miles an hour is a safe rate of speed to couple and uncouple cars. They also testified that such work was more or less dangerous. Appellant cited the cases of *Towner v. Railway Co.*, 52 Mo. App. 648; *Marsh v. Railroad Co.*, 56 Ga. 274; *Williams v. Railroad Co.*, 43 Iowa, 396; and *Jackson v. Railroad Co.*, 31 Kan. 763, 3 Pac. Rep. 501,—as holding that plaintiff was guilty of contributory negligence in going between the cars when in motion, he being aware of the danger, and there being no necessity for his so doing. The first case differs very materially in its facts from the case at bar. In that case the deceased went in between the cars to uncouple them, while they were moving at a rate of speed of between four and six miles per hour, in violation of the

rules of the company. He was seen to "jump in and go out as if they were going too fast," and then return again, and was killed. In the case at bar the plaintiff was not acting in violation of the rules of the company. The cars were moving at a rate of speed from three to four miles per hour, which was shown to be a reasonably safe rate of speed for coupling and uncoupling cars. The difference in the facts is obvious. In the Williams Case the question presented was as to whether the accident was the proximate result of the defective construction of the cars. The plaintiff, in attempting to couple them, failed to do so at the first attempt, and, instead of stepping out from between them, as he might have done, continued the attempt as the cars were moving along, and caught his foot in a frog, and was injured. No negligence was attributed to the company on account of the frog, and it was rightfully held that he could not recover. The Jackson case only affirms the well-known general rule that when the servant continues in the service of the master with full knowledge of a defect in machinery which he uses in his service, he is presumed to assume the risk, and cannot recover for injuries sustained by him by reason of such defect. There are, however, exceptions to this general rule. In the Marsh Case, the cars were in rapid motion when the injured party "rushed in and tried to uncouple" them, and it was held that he was guilty of contributory negligence, and no recovery could be had against the company. Under the facts disclosed by the record, plaintiff was not guilty of negligence *per se*, nor would the court have been justified in so declaring as a matter of law, notwithstanding plaintiff was the absolute control of the train at the time of the accident. In addition to what has been stated, he testified that he did not have time to uncouple the car while the train was standing still, and that the way he attempted to do it was the customary way.

The court was asked to reverse the judgment upon the ground that the damages awarded by the jury are excessive, and manifest the result of passion or prejudice. As there is no way, in so far as the law is advised, by which it can be proven that jurors who seem to have made an excessive verdict were controlled by improper influences, such an inference can only be inferred when such verdict is so out of line with reason and justice as to shock the conscience, and satisfy the unbiased mind that it is not the result of an impartial, unprejudiced, deliberative body. To justify such an inference, the facts and circumstances in proof ought not to justify any other conclusion. The plaintiff at the time of the injury, was a few months over thirty-two years of age, in the vigor of manhood, and earning \$65 per month. His leg was crushed below the knee, which necessitated amputation.

It was amputated three times, the last time above the knee. He remained in the hospital for six months; is a cripple for life. His suffering was long and severe. The jury gave him a verdict for \$10,000, and the trial court gave it his approval. While the verdict is large, it cannot be said that it was the result of passion or prejudice, and it has been recently held that this court has no power to require a *remittitur*. *Rodney v. Railway Co.* (Mo. Sup.) 30 S. W. Rep. 150.

Judgment affirmed.

Opinion by BURGESS, J.

SHERWOOD, J., dissented; GANTT, P. J., concurred.

DONAHEW v. CITY OF KANSAS CITY.

Supreme Court, Missouri, Division No. 2, January, 1897.

INJURED WHILE DIGGING TRENCH FOR SEWER—LIABILITY OF CITY.—A corporation is liable for damages for injury sustained by an employee while engaged upon a sewer which was being made under the direction of its superintendent, to the same extent as an individual would be under the same circumstances.

FELLOW-SERVANT.—It is not the negligence of a fellow-servant where a laborer is injured while digging a trench, under the direction of the city's superintendent.

RISK OF EMPLOYMENT.—A laborer is not prevented from recovering damages for a personal injury on the ground of risk of employment, because he knew the manner of the work in hand; it must be shown that he knew the work was dangerous, and with such knowledge continued to work.

APPEAL from judgment for plaintiff from Circuit Court, Jackson county.

H. C. McDUGAL, F. F. ROZZELLE and C. S. PALMER, for appellant.

W. B. TEASDALE and R. J. INGRAHAM, for respondent.

Action for damages for personal injuries sustained by plaintiff while engaged as a laborer in digging a trench for a sewer in the city of Kansas City. Plaintiff was employed by the superintendent of streets of the city who was authorized to construct the sewer by the city's board of public works. The work was being done under the immediate charge of a foreman, who was also employed by the superintendent. The negligence alleged was the insufficient bracing of the trench which plaintiff was helping to dig, by reason of which the ditch fell in and plaintiff was severely injured. Plaintiff recovered

judgment for \$3,500. The sewer was being constructed under the authority of a city ordinance. Defendant contended that as the work was not done in strict accordance with the ordinance as to bids, it was not liable for the injury sustained by plaintiff. The corporation having, as a natural person, undertaken the construction of the sewer, is to the same extent, and under the same circumstances, liable in damages for the wrongful acts of its officers and servants, and cannot escape responsibility upon the ground that the wrongful acts resulted from powers not granted by its charter or ordinances. Neither could the fact that the work was being done under the immediate direction of a foreman employed by the superintendent charge the negligence as that of a fellow-servant. The foreman was but the defendant itself acting through another medium. Nor could the fact that plaintiff knew the manner in which the trench was braced be claimed that he assumed the risks of employment, and, therefore, was precluded from recovery. It must be further shown that plaintiff knew it was dangerous, and that he thereafter continued to work knowing it to be so. Defendant owed to plaintiff a duty to furnish him a reasonably safe place in which to work.

Judgment affirmed.

Opinion by BURGESS, J.

STATE V. DREHER.

Supreme Court, Missouri, January, 1897.

ATTORNEY AND CLIENT — NEGLIGENCE.—A new trial will not be granted on the ground of negligence or want of skill of an attorney. *State v. Jones*, 12 Mo. App. 93, disapproved.

APPEAL from conviction for murder from St. Louis Criminal Court.

LEE MERIWETHER, for appellant.

R. F. WALKER, attorney-general, and C. O. BISHOP, for the State.

Defendant was indicted, at the May Term, 1894, of the St. Louis Criminal Court, for the murder of Bertha Hunicke, on January 29, 1894. The grounds of appeal were upon the evidence as to insanity of defendant, and the negligence and incompetency of the defendant's attorney in conducting the defense. On the latter ground the court said:

"We are brought now to consider the proposition of the present

counsel, in the case that a new trial should be awarded, because the management of the case by defendant's attorney in the court below was totally lacking in skill and care, so that, by reason of the inefficiency of the attorney, defendant did not have a fair trial. This criticism of the counsel who conducted the defense is founded upon the alleged failure of said counsel to consult with defendant's witnesses before they came into court, and his failure to subpoena the relatives of defendant to testify on the preliminary trial of his sanity, and that, by reason of not consulting the witnesses, several of the witnesses testified defendant was insane, but gave trivial and ridiculous reasons for their opinions. Another alleged oversight was the placing of the experts on the stand before he had fully developed the defense by other non-expert witnesses. Much censure is indulged, also, because of the facts assumed in the hypothetical question, and the omission therefrom of many facts deemed by the present attorney as greatly strengthening the case; and another criticism of counsel because he misunderstood an oral ruling of the judge. The foregoing is a fair summary of the reasons why the insufficiency of the lawyer who tried the case should secure a reversal by this court. * * *

"We have gone seriously into an examination of this record, and we think that the effort to obtain a new trial on account of the inefficiency of the counsel who defended in the Criminal Court is without any just basis. But we are not to be understood as consenting that, even if there had been negligence or want of skill, it would have afforded any ground for reversal. The neglect of an attorney is the neglect of his client, in respect to the court and his adversary. The decisions are too numerous to cite, but their uniform tenor is to the effect that neither ignorance, blunders, nor misapprehensions of counsel, not occasioned by his adversary, is ground for setting aside a judgment or awarding a new trial. *Field v. Matson*, 8 Mo. 686; *Gehrke v. Jod*, 59 Mo. 522. The rule is founded upon the wisest public policy. To permit clients to seek relief against their adversaries upon the alleged negligence or blunders of their own attorneys would open the door to collusion, and would lead to endless confusion in the administration of justice. The business of the courts cannot be conducted on any other terms than that parties must be held by the acts of their attorneys in their behalf in causes in which they are authorized to appear, and, in the absence of fraud, leaving the client to his remedy against the attorney for his negligence. After a most laborious search we have found but one case in which an appellate court has reversed a sentence or judgment on the ground of the negligence or incompetency of an attorney.

That case is *State v. Jones*, 12 Mo. App. 93. In that case no authority was found upon which to base the ruling, and we cannot find that it has ever been followed in this or any other State. We readily agree with the learned court that decided that case that the record presented a most lamentable example of ignorance and incompetency, and that the trial court should have afforded the remedy by setting aside the verdict and appointing a competent attorney for the prisoner; but we think that the Court of Appeals in that case suffered a hard case to make bad law, and ignored the fact that it was a court for the review of errors only, and that it was confined to such errors as appeared on the record proper, and to such exceptions as had been ruled on by the trial court. For the distinguished jurist who wrote that opinion and his associates we have the profoundest respect. We doubt not that, in that individual instance, their judgment wrought justice; but we cannot give it our sanction as a rule of practice or procedure, and it is accordingly disapproved. We are bound to presume that the court which appointed the counsel to defend the prisoner in this case knew him to be a reputable member of the bar, and that it discovered nothing in his conduct calling for his displacement and the appointment of another in his stead. To sustain this contention would be to condemn the counsel, who gave defendant his services without reward, without according him a hearing in a matter vitally affecting his professional standing, and would be an indirect censure of the court, who was a witness to his conduct throughout the trial. We will not do either."

Judgment affirmed.

Opinion by GANTT, P. J.

SHERWOOD and BURGESS, JJ., concurred.

MULVILLE v. PACIFIC MUTUAL LIFE INSURANCE COMPANY OF CALIFORNIA.

Supreme Court, Montana, January, 1897.

CONTRIBUTORY NEGLIGENCE.—When pleaded as a defense, the burden of proving contributory negligence is on defendant.

JUMPING ON MOVING TRAINS — EVIDENCE.—Evidence that the deceased was in the habit of jumping upon moving trains was properly excluded in an action upon an insurance policy where contributory negligence was an issue.

EVIDENCE.—Evidence of the space between the cars and the track was properly admitted, the deceased having been found between the rails.

COMPROMISE OF CLAIM BY ADMINISTRATOR.—The compromise of a claim by an administrator against a life insurance company on a policy issued to a decedent is authorized by section 232 Prob. Prac. Act, Comp. St. 1887.

APPEAL from District Court, Silver Bow county, in action by Samuel Mulville, administrator, against defendant.

WILLIAM SCALLON, for appellant.

STAPLETON & STAPLETON, for respondent.

This was an action to recover the amount of an accident insurance policy taken out by one Charles F. Young, who was injured by a railroad train in Silver Bow county, and died almost immediately. The answer alleged contributory negligence, and settlement and compromise with the public administrator before the appointment of the subsequent administrator, the plaintiff in this action. There was a verdict for plaintiff and the trial court granted defendant's motion for a new trial. Plaintiff appealed. There was no error in the trial court holding that the burden of proof was on the defendant to establish contributory negligence on the part of the deceased (1). Nor in excluding evidence as to the deceased having made a practice of jumping on a train while in motion (2).

Nor was it error to allow evidence as to the space between the cars and the track, it having been stated by a witness that he had found the wounded man between the rails of the track. This evidence, tending as it did, to establish that it was a physical impossibility for the man to have been between the cars and the track without being more crushed, was clearly admissible in rebuttal. There was no error in the admission of the sworn and subscribed testimony of a witness before the coroner's jury in order to contradict him. In the exclusion of the probate order and receipt of compromise the lower court erred. Irrespective of statutory power, an administrator has authority to compromise with a debtor of his decedent. *Jeffries v. Insurance Co.*, 110 U. S. 305, 4 Sup. Ct. 8; *Moulton v. Holmes*, 57 Cal. 337. And in Montana, sec. 232, Prob. Prac. Act, Comp. St. 1887 (sec. 2737, Code Civil Proc. 1895) expressly confers this power upon administrators.

Order affirmed.

Opinion by BUCK, J.

1. Contributory negligence is a matter of defense, *Higley v. Gilmer*, 3 Mont. 90; *Wall v. Railway Co.*, 12 Mont. 44, 29 Pac. 721; *Nelson v.*

City of Helena, 16 Mont. 21, 39 Pac. 905.

2. Citing *Baker v. Irish*, 172 Pa. St. 531, 33 Atl. 558.

CITY OF ORD v. NASH.

Supreme Court, Nebraska, January, 1897.

SIDEWALKS.—The term sidewalk is a comprehensive one and in its broadest sense denotes that portion of the public highway set apart by dedication ordinance or otherwise for the use of persons traveling on foot.

DUTY OF CITY TO KEEP STREETS IN REPAIR.—Where a city or other municipality, grades or improves a street, there is a resulting duty to keep it in repair and a consequent liability for a failure to do so.

ERROR to District Court, Valley county. Action by Ann E. Nash against City of Ord for personal injuries.

A. NORMAN, A. M. ROBBINS and COFFIN & STONE, for plaintiff in error.

CHARLES A. MUNN and CLEMENTS BROS., for defendant in error.

Suit for negligence of defendant city in causing and continuing a deep and dangerous excavation or trench at the intersection of two streets within said city. The streets in question had been graded and improved by authority of the city, and the trench described in the petition was made some time previous to the accident in order to facilitate the repairing of water mains laid the year previous. The plaintiff below was, at the time of the accident, returning home from the house of a neighbor, along a path extending east and west, commonly used by pedestrians, and which, at the intersection of said streets, was within a few inches of the trench above described into which she fell and was injured. In general, where a city or other municipality grades or improves any portion of a street for the purposes and with the result of inducing public travel thereon, there is a resulting duty to keep such portion in repair and the consequent liability for a failure to do so. *Lindholm v. City of St. Paul*, 19 Minn. 245 (Gil. 204); *Triese v. City of St. Paul*, 36 Minn. 526, 32 N. W. 857; *City of Lincoln v. Gillilan*, 18 Neb. 114, 24 N. W. 444; *City of South Omaha v. Cunningham*, 31 Neb. 316, 47 N. W. 930.

Judgment affirmed.

Opinion by Post, J.

**UNION PACIFIC RAILWAY COMPANY v.
METCALF.**

Supreme Court, Nebraska, January, 1897.

PARTNERSHIP — CONSIGNOR.— When an action by a partnership does not abate in an action for failure of a carrier to deliver goods.

THIS was an action by Lafayette Metcalf and James H. Wood, partners, as Metcalf & Wood, against the Union Pacific Railway Company. After the action was commenced the plaintiff Metcalf died. Judgment was rendered for the surviving plaintiff and defendant brought error.

J. M. THURSTON, W. R. KELLY and E. P. SMITH, for plaintiff in error.

SEDGWICK and POWER, for defendant in error.

The petition set forth that the plaintiffs, A. and B., were a firm composed of A. and B., formed for the purpose of doing business in this State. The caption was in the firm name alone. The summons did not appear in the record. *Held*, that the action was not brought under section 24 of the Code, authorizing partnerships to sue without setting forth the names of the partners and that it did not abate on the death of one of the partners. That the surviving partner was already a party to the action and that on the death of the other partner, the action could properly be continued in the name of the survivor alone.

An action against a carrier for failure to deliver goods cannot be maintained by the consignor in the absence of averments that he was the owner of the goods, that he was liable for their loss or that he had sustained special damage.

Reversed.

Opinion by IRVINE, C.

VILLAGE OF CULBERTSON v. HOLLIDAY.

Supreme Court, Nebraska, January, 1897.

FALLING INTO EXCAVATION IN STREET.— In a suit against a municipal corporation for damages alleged to have been sustained by plaintiff falling into an unguarded excavation in a lot fronting on a street, a correct plan or drawing of the excavation and the surrounding locality is competent evidence.

ORDINARY CARE.—The law requires of a person the exercise of care and caution commensurate with the danger confronted, but this rule involves no more than the exercise of ordinary care and prudence in view of the circumstances.

NEGLIGENCE.—The law does not require of an old person the exercise of greater care to avoid injury than it requires of a young and vigorous one. It requires of each the exercise of ordinary care. It requires of neither the exercise of extraordinary care.

INSTRUCTIONS TO JURY.—Such expressions as "slight negligence" and "slight want of ordinary care" should not be used in instructions, as they tend to obscure and confuse what should be stated in plain and concise language.

SLIGHT NEGLIGENCE.—In an action for damages for injuries alleged to have been sustained through the negligence of another there is no such issue as the slight negligence of any one.

COMPARATIVE NEGLIGENCE.—The doctrine of comparative negligence is not in force in this State. Our courts recognize no degrees of negligence. The rule is that if a person himself, in the exercise of ordinary care, is injured through the negligence of another, he may recover; but if his own negligence contributed to, or was the proximate cause of, the injury, he cannot recover.

ERROR from judgment of District Court, Hitchcock county, in favor of plaintiff in action by Alexander G. Holliday against defendant.

L. H. BLACKLEDGE, for plaintiff in error.

WM. O. WOOLMAN and COBB & HARVEY, for defendant in error.

On April 12, 1893, Alexander G. Holliday, a man seventy-seven years of age, was conducting a store on the southeast corner of the intersection of Taylor avenue and Wyoming street, in the village of Culbertson. Holliday's residence was a block west and a half block south of his store. At that date there existed an excavation in the lot on the southeast corner of the intersection of said thoroughfares and immediately west of Holliday's store. This excavation had been made for the purpose of erecting a building on said lot. The night of that day was very dark, and Holliday, then going from his store to his residence, fell into said excavation and was injured. He brought suit for negligence of village in failing to protect such excavation by barriers, danger signals or otherwise. He had a verdict and judgment. The instruction that the plaintiff, in order to recover, need not be wholly free from negligence, provided his negligence is but slight and the other party is guilty of gross negligence in comparison therewith, as defined in these instructions, was error."

Judgment reversed.

Opinion by RAGAN, C.

**WESTERN WHEELED SCRAPER CO. v.
SADILEK (1).**

Supreme Court, Nebraska, January, 1897.

BANK CHECK NOT INTENDED FOR CIRCULATION.—A customer's bank check is not intended for circulation as a medium of exchange, and should be presented for payment with the dispatch consistent with the circumstances of the case and the transaction of other commercial business.

SENDING BANK CHECK TO DRAWEE FOR COLLECTION.—A bank which undertakes the collection of a customer's check is guilty of negligence in sending it for payment direct to the drawee bank, provided there is in the same town another bank in good standing.

NOTICE OF DISHONOR OF CHECK TO BE PROMPTLY GIVEN.—A bank receiving for collection a customer's check is required to pay the same upon the receipt thereof during business hours, or to promptly give notice of its dishonor in order to charge the drawer and indorsers thereof.

ERROR from judgment of District Court, Saline county, in favor of defendant in action by Western Wheeled Scraper Company against F. J. Sadilek.

HASTINGS & MCGINTIE, for plaintiff in error.

F. I. FOSS and W. R. MATSON, for defendant in error.

Defendant drew his check, on August 12, 1891, to the order of plaintiff upon the Bank of Western, situated at the village of Western, and in which he had ample funds. It was forwarded to plaintiff at Aurora on the day of its date and was received by the plaintiff on August 14th. On the succeeding day, to wit, August 15, the check in question was by the plaintiff deposited in the Second National Bank of Aurora, by which it was, on the same day, forwarded for collection and return to the Bank of Western. Said check was on the 17th day of August received by the Bank of Western, and has not been paid, although said bank continued open for the transaction of business until August 19th, on which day it was closed by order of the State Banking Board, and is now insolvent. The village of Western is situated about twenty miles distant from Wilber, the defendant's home, and about 500 miles from the city of Aurora. It has railroad and telegraph connection with both places named, and there was at the date in question another bank thereat in good standing. In addition to the foregoing, it is shown that the

1. Compare *First Nat. Bank of Portland v. Linn County Nat. Bank* (Oregon), reported in this volume, p. 159, *post*.

time required for the transmission of letters by mail between Aurora and Western does not exceed twenty-four hours, from which the inference necessarily arises that the check forwarded by the Aurora bank on the 15th was received by the Bank of Western during business hours on the 17th.

Is the defendant in this action answerable for the loss resulting from the failure of the last-named bank? We think not. There is eminent authority for the proposition that a bank which undertakes the collection of a customer's check, is guilty of inexcusable negligence in sending it direct to the drawee bank, instead of through the agency of a third person, provided loss ensue through the failure of such drawee. *Bank v. Goodman*, 109 Pa. St. 422, 2 Atl. Rep. 687; *Drovers' Nat. Bank v. Anglo-American Packing & Prov. Co.*, 117 Ill. 100, 7 N. E. Rep. 601; *Anderson v. Rodgers*, 53 Kan. 542, 36 Pac. Rep. 1067; *First Nat. Bank of Corsicana v. City Nat. Bank of Dallas* (Texas Civ. App.), 34 S. W. Rep. 459; *Bank v. Burns*, 12 Colo. 539, 21 Pac. Rep. 714; *First Nat. Bank of Evansville v. Fourth Nat. Bank of Louisville*, 6 C. C. A. 183, 56 Fed. Rep. 967; 1 Daniel, Neg. Inst. 328a. The principle recognized in the foregoing authorities is that no party, whether a corporation, firm, or individual, can, in contemplation of law, be deemed a suitable agent to enforce, in behalf of another, a claim against itself. But, independent of the rule there stated, the defendant was discharged in consequence of the negligence of plaintiff's chosen agent, the Bank of Western. A customer's check is, in the first place, not designed for circulation as a medium of exchange, and should be presented for payment with the dispatch and diligence consistent with the circumstances of the case, and the transaction of other commercial business. *Bank v. Miller*, 37 Neb. 500, 55 N. W. Rep. 1064. In the second place, it was the duty of the drawee bank to promptly pay the check upon receipt thereof for collection, or to give notice of its dishonor in order to charge the drawer and indorsers. *Wood River Bank of Wood River v. First Nat. Bank of Omaha*, 36 Neb. 744, 55 N. W. Rep. 239. Time may be necessary, it is true, for the drawee bank to examine its books in order to ascertain the condition of the drawer's account; but, in the absence of evidence to the contrary, it will be presumed that the officers of the bank were aware of the fact conclusively established by the record, viz., that the defendant had therein to his credit at all times from the 12th to the 19th of August, inclusive of both dates, ample funds for the payment of the amount called for. The check was, therefore, as held in *Wood River Bank of Wood River v. First Nat. Bank of Omaha*, *supra*, dishonored on the 17th; and the defendant, as drawer, was entitled to notice

by the first regular mail on the 18th. 3 Kent's Com. 105; 1 Daniel, Neg. Inst. 1039, and cases cited.

Judgment affirmed.

Opinion by Post, J.

BROTHERTON V. MANHATTAN IMPROVEMENT COMPANY.

Supreme Court, Nebraska, January, 1897

FAILURE TO PROVIDE WATCHER BY PROPRIETOR OF BATHING BEACH — DEATH OF BATHER BY DROWNING.—The proprietor of a public bathing beach who fails to provide a watcher for the purpose of assisting bathers who may be in danger of drowning, and upon timely information being given to him that a bather was in imminent danger, neglects to afford immediate assistance, is guilty of negligence that will justify a jury to award damages for the death of the bather.

An opinion was filed in this case and reported in 48 Neb. 563, 67 N. W. Rep. 479. On the rehearing the conclusions reached in the former opinion are adhered to.

The company kept a boat at the beach for use in case of accident to bathers, but no one whose duty it was to watch them or rescue those in danger. Notice was brought home to an agent of the company that a bather was missing in time to have rescued him if immediate measures had been taken, but the agent advised that a search be made along the shore for the missing bather.

It seems to be assumed by the argument of the defendant in error that immediately upon Brotherton's being missed, there remained nothing to be done but to look for his submerged body. If this assumption is correct, it quite conclusively implies that necessary relief, to be effective, must be rendered as soon as the bather is seen to be in trouble. The evidence shows that the defendant invited every one to partake of the privileges without regard to his or her ability to swim. It was, therefore, to be reasonably expected that among 10,000 monthly patrons there would be some without skill or experience. It must be admitted that in case an unskilful swimmer was about to drown, tardy aid would probably be unavailing. It therefore seems to us that a jury would have been justified in finding in respect to Brotherton, that the failure to provide a watcher in advance to prevent such accidents, and upon timely information of existing imminent danger to him, to neglect attempting to afford

him immediate assistance was negligence on the part of the defendant. One who maintains a public bathing beach cannot escape liability merely by showing that he has done nothing to render the premises unsafe. *Dinnihan v. Improvement Co.*, 8 App. Div. 509, 40 N. Y. Supp. 764.

Judgment of District Court reversed.

Opinion by RYAN, C.

SHIELDS v. ORR EXTENSION DITCH COMPANY.

Supreme Court, Nevada, January, 1897.

INJURY TO LAND CAUSED BY SEEPAGE OF WATER FROM DITCH.—

The doctrine of contributory negligence is not applicable in an action for damages for injury to land caused by the escape of water from a ditch that was defective when the defects were known to the owner, who could have prevented the injury.

LIABILITY OF OWNER OF DITCH.—An owner is liable for damages caused by seepage of water from his ditch.

INJUNCTION TO PARTY PREVAILING.—Plaintiff is entitled to an injunction in an action to restrain defendant from allowing water to escape from its ditch upon plaintiff's land, although defendant claimed prescriptive right therein which would in time ripen into an adverse right, when the plaintiff prevailed.

TORREYSON & SUMMERFIELD and THOS. E. HAYDEN, for appellant.

CURLER & CURLER, for respondent.

APPEAL from judgment of District Court, Washoe county, in favor of plaintiff in action by M. Shields against defendant for damages to his land and crops by water escaping from appellant's ditch, and for an injunction restraining a repetition of the wrongs complained of. Jury rendered a verdict for \$50.36 for plaintiff, and thereupon court granted an injunction. The uncontroverted evidence showed that the ditch was on a hillside sloping towards plaintiff's lands, and that the ground was porous and rocky and water constantly escaped with the knowledge of the defendant, not by means of overflow, but by seepage and leakage through its banks. As the uncontradicted testimony showed negligence of defendant in permitting water to escape from its ditch the issue of negligence was eliminated from the case, and all instructions drawn upon that theory were properly refused as being inapplicable and misleading. An instruction was asked to the effect that the plaintiff himself

should have exercised ordinary care to have avoided the consequences of defendant's acts, and, failing to do so, the parties were in mutual fault. The doctrine of contributory negligence is not applicable to cases of this nature where the defendant had knowledge of the defects of its ditch and could have prevented the injury. Under these circumstances, no duty rested upon plaintiff to have avoided the consequences of defendant's acts (1). All of the testimony showed that the seepage of water from defendant's ditch was the cause of the damage. In such case defendant's liability is well settled. *Richardson v. Kier*, 34 Cal. 63; *Parker v. Larsen*, 86 Cal. 236, 24 Pac. 989; *Pixley v. Clark*, 35 N. Y. 520; *Angell on Water-courses*, sec. 330. It was not error to have granted the injunction, although the damages sustained by plaintiff were trivial and the inconvenience to defendant disproportionate to the loss sustained. In its answer defendant claimed a prescriptive right which would in time ripen into an adverse right. In such cases the party prevailing is entitled to have an injunction for the vindication of his right and its preservation. *Brown v. Ashley*, 16 Nev. 316, and cases cited.

Judgment affirmed.

Opinion by BELKNAP, J.

COMBEN v. BELLEVILLE STONE COMPANY OF NEW JERSEY.

Court of Errors and Appeals, New Jersey, January, 1897.

EMPLOYEE KILLED WHILE AT WORK IN QUARRY—NEGLIGENCE FOR JURY.—Where plaintiff's intestate was killed while at work in a quarry of defendants, and there was conflicting testimony as to negligence a nonsuit was error, as the question was for jury.

APPEAL from judgment of nonsuit rendered in Circuit Court, Essex county.

THOMAS J. LINTOTT, for plaintiff in error.

HAYS & LAMBERT, for defendant in error.

In an action for damages for injuries sustained by an employee of defendant, due to alleged negligent operation of machinery in a

1. "A person owning a ditch from which water escapes upon the premises of an adjoining landowner, cannot escape liability on the ground that such landowner might, at a small expense, have prevented any damage by dig-

ging a ditch on his own land that would have carried off the waste water." *McCarty v. Canal Co.* (Idaho) 10 Pac. R. 623, and cases cited; *Black's Pomeroy, Water Rights*, sec. 197.

quarry, whereby plaintiff's intestate was thrown from a ledge of rock where he was working and killed, it was error to nonsuit where there was conflicting testimony on the questions as to whether the accident was due to negligence of a fellow-servant and whether the injured party was guilty of contributory negligence, as these are questions for the jury to determine (1).

The rule of law in New Jersey is that the master's duty to his servant requires of the former the exercise of reasonable care and skill in furnishing safe machinery for carrying on the business for which he employs the servant, and in keeping such machinery and appliances in repair, including the duty of making inspections and tests at proper intervals; and, besides, the master is responsible for the negligence of any agent whom he may select to perform this duty for him, if the agent fails to exercise reasonable care and skill in its performance (2).

Judgment reversed.

Opinion by LIPPINCOTT, J.

FOGASSI v. THE NEW YORK CENTRAL AND HUDSON RIVER RAILROAD COMPANY (3).

Supreme Court, New York, Appellate Term, January, 1897.

PASSENGER FALLING INTO OPENING WHILE LEAVING FERRY-BOAT.—A passenger who, in attempting to leave a ferryboat in the night time by means of a plank provided by the company, falls into an opening between the boat and the dock and she testified that she was not looking where she was stepping and could not have seen the opening if she had looked because of insufficiency of light, is guilty of contributory negligence.

APPEAL from judgment of City Court of New York in favor of plaintiff in action for personal injuries sustained in falling from ferryboat.

ASHBEL GREEN and HERBERT E. KINNEY, for appellant.

PETER MITCHELL and CAMPORA & REVILLE, for respondent.

The plaintiff, with her husband and daughter were passengers on the West Shore railroad operated by the defendant and were transported across the Hudson river in a ferryboat landing at the foot of

1. Citing *Van Steenburgh v. Thornton*, 57 N. J. Law, 160, 33 Atl. Rep. 380; *Electric Co. v. Kelly*, 57 N. J. Law, 100, 29 Atl. Rep. 427.

2. Citing *Steamship Co. v. Ingebregsten*, 57 N. J. Law, 400, 31 Atl. Rep. 619.

3. Reversing same case reported in 6 Am. Neg. Cas.

Franklin street about nine o'clock at night. The passengers had to leave the boat by means of a plank laid from the boat to the dock across a gap or opening about two feet in width, between the boat and the dock or bridge. Into this opening the plaintiff fell, and the question is whether such fall was due in any degree to her neglect of ordinary precautions while attempting to leave the boat. The case for the plaintiff is not substantially altered from that of the first trial. 13 Misc. 102. The plaintiff's want of care is established by her own testimony. Conceding that she tried to see when she was stepping on the plank, but could not, because of the crowd and the insufficient light, it is substantially shown that the light, if insufficient at that point at that minute, was so by reason of the shadows and of the obstruction caused by other passengers passing off at the same time; a prudent person would have halted an instant if she found her next step would be in the dark.

Judgment reversed.

Opinion by DALY, P. J.

STOCK v. LE BOUTILLIER.

Supreme Court, New York, Appellate Term, January, 1897.

MASTER AND SERVANT—DANGEROUS APPLIANCE—FELLOW-CLERK

INJURED.—Where an employer furnishes his clerks with poles to push the cars or baskets of an overhead system in a retail store when the baskets get stuck upon the track, without instructing the clerks as to the danger of pushing the baskets backward, and one of the baskets falls by reason of being pushed backward by a clerk and a fellow-clerk is injured, the master is liable.

APPEAL from judgment of City Court of New York in favor of plaintiff.

SETH B. ROBINSON, for appellants.

R. J. HAIRE, for respondent.

Plaintiff was employed by defendants in their retail store, and was injured by the fall of a car or basket from an overhead structure suspended from the ceiling, and used to convey parcels from one part of the store to the other. Defendants admitted the injury, but denied that the system was under their control, and alleged that the injury was caused by negligence of a salesman. It appeared that the salesman referred to stood at a counter just back of that occupied by the plaintiff, and separated from it by a partition, and seeing two of the baskets stopped on the line above the partition, he took

a pole, one of many provided by defendants for the purpose, and tried to shove the baskets apart, when one fell on the plaintiff's head. It was the duty of the defendants to properly instruct their employees as to the danger of attempting to push the baskets backwards. Nothing would be more natural if a car did not yield to a forward impulse than to attempt to move it the other way, as the salesman did. Omission of such instruction was negligence such as to render their employer liable for any injury caused to one of his employees, by the use of a dangerous appliance put in the control of another employee, without proper instruction.

Judgment affirmed.

Opinion by DALY, P. J.

WHALEN v. CITIZENS' GASLIGHT COMPANY.

Court of Appeals, New York, December 1896.

FALLING OVER FLAGSTONE ON SIDEWALK.—In actions for personal injuries absence of contributory negligence must be affirmatively shown on the part of the plaintiff.

Where a woman seventy years of age, on a clear day, having good eyesight, stumbled over a flagstone placed on the walk by a gas company that was laying a pipe, and there was an unobstructed space of five feet for the passage of pedestrians, she cannot recover for the injuries sustained.

APPEAL from General Term, City Court of Brooklyn, which affirmed a judgment for plaintiff.

FRANK SULLIVAN SMITH, for appellant.

ISAAC M. KAPPER, for respondent.

Defendant having obtained the consent of the city authorities of Brooklyn to remove a flagstone of the sidewalk for the purpose of laying a gas pipe, caused one of the stones next the building to be removed and also another one in the center of the walk, leaving an unobstructed space between the two openings of about five feet for the use of pedestrians. One of the flagstones four feet long and three feet wide was placed on an adjoining flagstone on the walk. The plaintiff approached and tripped and fell over the last mentioned stone. It was about eleven o'clock in the forenoon of a nice day, Sept. 12, 1893. She was seventy years of age, and testified that she had been engaged in doing general housework and sewing, and that her eyesight was very good, and that she didn't notice the stone or the excavation; that she was looking along the street as she walked. It is the settled law of this State that in actions of this character,

the absence of negligence on the part of the plaintiff contributing to the injury must be affirmatively shown by the plaintiff, and that no presumption of freedom from such negligence arises from the mere happening of an injury. *Reynolds v. Railroad Co.*, 58 N. Y. 248; *Weston v. City of Troy*, 139 N. Y. 281. If this law is to be recognized and followed we are unable to see how this judgment can be sustained, for to hold otherwise would practically overrule and annul the rule of contributory negligence.

To our minds the negligence here is greater than that of the plaintiff in the *Weston Case*, *supra*. See, also, *Beltz v. City of Yonkers*, 148 N. Y. 67.

The passing over the stone was unnecessary; it required but a step or two to one side to have the walk entirely unobstructed.

Judgment reversed.

Opinion by HAIGHT, J.

MITCHELL v. ROCHESTER RAILWAY COMPANY.

Court of Appeals, New York, December, 1896.

INJURIES CAUSED BY FRIGHT—PROXIMATE CAUSE.—No recovery can be had for fright occasioned by the negligence of another nor for the injuries resulting from the fright.

A miscarriage caused by fright cannot be said to have been the proximate result of another's negligence that produced the fright.

APPEAL from General Term, Supreme Court, Fifth Department, which affirmed order setting aside nonsuit. The facts appear in the opinion.

CHARLES J. BISSELL, for appellant (defendant).

NORRIS BULL, for respondent (plaintiff).

MARTIN, J.—The facts in this case are few, and may be briefly stated. On the 1st day of April, 1891, the plaintiff was standing upon a crosswalk on Main street, in the city of Rochester, awaiting an opportunity to board one of the defendant's cars which had stopped upon the street at that place. While standing there, and just as she was about to step upon the car, a horse-car of the defendant came down the street. As the team attached to the car drew near, it turned to the right, and came close to the plaintiff, so that she stood between the horses' heads when they were stopped. She testified that from fright and excitement, caused by the approach and proximity of the team, she became unconscious, and also that

the result was a miscarriage, and consequent illness. Medical testimony was given to the effect that the mental shock which she then received was sufficient to produce that result. Assuming that the evidence tended to show that the defendant's servant was negligent in the management of the car and horses, and that the plaintiff was free from contributory negligence, the single question presented is, whether the plaintiff is entitled to recover for the defendant's negligence which occasioned her fright and alarm, and resulted in the injuries already mentioned. While the authorities are not harmonious upon this question, we think the most reliable and better-considered cases, as well as public policy, fully justify us in holding that the plaintiff cannot recover for injuries occasioned by fright, as there was no immediate personal injury. *Lehman v. Railroad Co.*, 47 Hun, 355; *Commissioners v. Coultas*, 13 App. Cas. 222; *Ewing v. Railroad Co.*, 147 Pa. St. 40, 23 Atl. 340. The learned counsel for the respondent in his brief very properly stated that "the consensus of opinion would seem to be that no recovery can be had for mere fright," as will be readily seen by an examination of the following additional authorities: *Haile v. Railroad Co.*, 60 Fed. 557; *Joch v. Dankwardt*, 85 Ill. 331; *Canning v. Inhabitants of Williamstown*, 1 Cush. 451; *Telegraph Co. v. Wood*, 6 C. C. A. 432, 57 Fed. 471; *Renner v. Canfield*, 36 Minn. 90, 30 N. W. 435; *Allsop v. Allsop*, 5 Hurlst. & N. 534; *Johnson v. Wells, Fargo & Co.*, 6 Nev. 224; *Wyman v. Leavitt*, 71 Me. 227. If it be admitted that no recovery can be had for fright occasioned by the negligence of another, it is somewhat difficult to understand how a defendant would be liable for its consequences. Assuming that fright cannot form the basis of an action, it is obvious that no recovery can be had for injuries resulting therefrom. That the result may be nervous disease, blindness, insanity, or even a miscarriage, in no way changes the principle. These results merely show the degree of fright, or the extent of the damages. The right of action must still depend upon the question whether a recovery may be had for fright. If it can, then an action may be maintained, however slight the injury. If not, then there can be no recovery, no matter how grave or serious the consequences. Therefore, the logical result of the respondent's concession would seem to be, not only that no recovery can be had for mere fright, but, also, that none can be had for injuries which are the direct consequences of it. If the right of recovery in this class of cases should be once established, it would naturally result in a flood of litigation in cases where the injury complained of may be easily feigned without detection, and where the damages must rest upon mere conjecture or speculation. The difficulty which

often exists in cases of alleged physical injury, in determining whether they exist, and if so, whether they were caused by the negligent act of the defendant, would not only be greatly increased, but a wide field would be opened for fictitious or speculative claims. To establish such a doctrine would be contrary to principles of public policy. Moreover, it cannot be properly said that the plaintiff's miscarriage was the proximate result of the defendant's negligence. Proximate damages are such as are the ordinary and natural results of the negligence charged, and those that are usual, and may, therefore, be expected. It is quite obvious that the plaintiff's injuries do not fall within the rule as to proximate damages. The injuries to the plaintiff were plainly the result of an accidental or unusual combination of circumstances, which could not have been reasonably anticipated, and over which the defendant had no control, and hence her damages were too remote to justify a recovery in this action. These considerations lead to the conclusion that no recovery can be had for injuries sustained by fright occasioned by the negligence of another, where there is no immediate personal injury. The orders of the General and Special Terms should be reversed, and the order for the Trial Term granting a nonsuit affirmed, with costs. All concur, except Haight, J., not sitting, and Vann, J., not voting. Ordered accordingly.

ADAMS v. NEW JERSEY STEAMBOAT COMPANY.

Court of Appeals, New York, December, 1896.

LIABILITY OF STEAMBOAT COMPANIES THE SAME AS INNKEEPERS.—

The duties owed by the proprietors of a steamboat to the passengers in their charge are the same as those of an innkeeper to his guests, and hence where money was stolen from the state-room of a passenger in the nighttime without any negligence on his part, the company was liable without proof of negligence on its part.

APPEAL from General Term of Court of Common Pleas of New York, which affirmed judgment for plaintiff. The facts appear in the opinion.

W. P. PRENTICE, for appellant.

W. D. DAVIS, for respondent.

O'BRIEN, J.— On the night of the 7th of June, 1889, the plaintiff was a cabin passenger from New York to Albany on the defendant's steamer Drew, and for the usual and regular charge was assigned to

a state-room on the boat. The plaintiff's ultimate destination was St. Paul, in the State of Minnesota, and he had upon his person the sum of \$160 in money for the purpose of defraying his expenses of the journey. The plaintiff, on retiring for the night, left his money in his clothing in the stateroom, having locked the door and fastened the windows. During the night it was stolen by some person, who apparently reached it through the window of the room. The plaintiff's relations to the defendant as a passenger, the loss without negligence on his part, and the other fact that the sum lost was reasonable and proper for him to carry upon his person to defray the expenses of the journey, have all been found by the verdict of the jury in favor of the plaintiff. The appeal presents, therefore, but a single question, and that is, whether the defendant is, in law, liable for this loss without any proof of negligence on its part. The learned trial judge instructed the jury that it was, and the jury, after passing upon the other questions of fact in the case, rendered a verdict in favor of the plaintiff for the amount of money so stolen. The judgment entered upon the verdict was affirmed at General Term, and that court has allowed an appeal to this court.

The defendant has, therefore, been held liable as an insurer against the loss which one of its passengers sustained under the circumstances stated. The principle upon which innkeepers are charged by the common law as insurers of the money or personal effects of their guests originated in public policy. It was deemed to be a sound and necessary rule that this class of persons should be subjected to a high degree of responsibility in cases where an extraordinary confidence is necessarily reposed in them, and where great temptation to fraud and danger of plunder exists by reason of the peculiar relations of the parties. Story, *Bailm.* sec. 464; 2 Kent's *Com.* 592; *Hulett v. Swift*, 33 N. Y. 571. The relations that exist between a steamboat company and its passengers, who have procured state-rooms for their comfort during the journey, differ in no essential respect from those that exist between the innkeeper and his guests. The passenger procures and pays for his room for the same reasons that a guest at an inn does. There are the same opportunities for fraud and plunder on the part of the carrier that was originally supposed to furnish a temptation to the landlord to violate his duty to the guest. A steamer carrying passengers upon the water, and furnishing them with rooms and entertainment, is, for all practical purposes, a floating inn, and hence the duties which the proprietors owe to the passengers in their charge ought to be the same. No good reason is apparent for relaxing the rigid rule of the common law which applies as between innkeeper and guest;

since the same considerations of public policy apply to both relations. The defendant, as a common carrier, would have been liable for the personal baggage of the plaintiff, unless the loss was caused by the act of God or the public enemies; and a reasonable sum of money for the payment of his expenses, if carried by the passenger in his trunk, would be included in the liability for loss of baggage. *Merrill v. Grinnell*, 30 N. Y. 594; *Merritt v. Earle*, 29 N. Y. 115; *Elliott v. Rossell*, 10 Johns. 7; *Brown*, Carr. sec. 41; *Redf. Carr. sec. 24*; *Ang. Carr. sec. 80*. Since all questions of negligence on the part of the plaintiff, as well as those growing out of the claim that some notice was posted in the room regarding the carrier's liability for the money, have been disposed of by the verdict, it is difficult to give any good reason why the measure of liability should be less for the loss of the money, under the circumstances, than for the loss of what might be strictly called baggage. The question involved in this case was very fully and ably discussed in the case of *Crozier v. Steamboat Co.*, 43 How. Prac. 466, and in *Macklin v. Steamboat Co.*, 7 Abb. Prac. (N. S.) 229. The liability of the carrier in such cases as an insurer seems to have been very clearly demonstrated in the opinion of the court in both actions, upon reason, public policy, and judicial authority. It appears from a copy of the *remittitur* attached to the brief of plaintiff's counsel, that the judgment in the latter case was affirmed in this court, though it seems that the case was not reported.

It was held in *Carpenter v. Railroad Co.*, 124 N. Y. 53, 26 N. E. 277, that a railroad running sleeping coaches on its road was not liable for the loss of money taken from a passenger while in his berth, during the night, without some proof of negligence on its part. That case does not, we think, control the question now under consideration. Sleeping-car companies are neither innkeepers nor carriers. A berth in a sleeping car is a convenience of modern origin, and the rules of the common law in regard to carriers or innkeepers have not been extended to this new relation. This class of conveyances are attached to the regular trains upon railroads for the purpose of furnishing extra accommodations, not to the public at large, nor to all the passengers, but to that limited number who wish to pay for them. The contract for transportation, and liability for loss of baggage, is with the railroad, the real carrier. All the relations of passenger and carrier are established by the contract implied in the purchase of the regular railroad ticket, and the sleeping car is but an adjunct to it only for such of the passengers as wish to pay an additional charge for the comfort and luxury of a special apartment in a special car. The relations of the carrier to a passenger

occupying one of these berths are quite different with respect to his personal effects, from those which exist at common law between the innkeeper and his guest, or a steamboat company that has taken entire charge of the traveler by assigning to him a stateroom. While the company running sleeping cars is held to a high degree of care in such cases, it is not liable for a loss of this character without some proof of negligence. The liability as insurers which the common law imposes upon carriers and innkeepers has not been extended to these modern appliances for personal comfort, for reasons that are stated quite fully in the adjudged cases, and that do not apply in the case at bar. *Ulrich v. Railroad Co.*, 108 N. Y. 80, 15 N. E. 60; *Car. Co. v. Smith*, 73 Ill. 360; *Woodruff Co. v. Diehl*, 84 Ind. 474; *Lewis v. Car. Co.*, 143 Mass. 267, 9 N. E. 615.

But, aside from authority, it is quite obvious that the passenger has no right to expect, and, in fact, does not expect, the same degree of security from thieves while in an open berth in a car on a railroad as in a stateroom of a steamboat, securely locked, and otherwise guarded from intrusion. In the latter case, when he retires for the night, he ought to be able to rely upon the company for his protection with the same faith that the guest can rely upon the protection of the innkeeper, since the two relations are quite analogous. In the former, the contract and the relations of the parties differ at least to such an extent as to justify some modification of the common-law rule of responsibility. The use of sleeping cars by passengers in modern times created relations between the parties to the contract that were unknown to the common law, and to which the rule of absolute responsibility could not be applied without great injustice in many cases. But in the case at bar no good reason is perceived for relaxing the ancient rule, and none can be deduced from the authorities. The relations that exist between the carrier and the passenger who secures a berth in a sleeping car or in a drawing-room car upon a railroad are exceptional and peculiar. The contract which gives the passenger the right to occupy a berth or a seat does not alone secure to him the right of transportation. It simply gives him the right to enjoy special accommodations at a specified place in the train. The carrier by railroad does not undertake to insure the personal effects of the passenger which are carried upon his person against depredation by thieves. It is bound, no doubt, to use due care to protect the passenger in this respect; and it might well be held to a higher degree of care when it assigns sleeping berths to passengers for an extra compensation than in cases where they remain in the ordinary coaches, in a condition to protect themselves. But it is only upon the ground of negligence

that the railroad company can be held liable to the passenger for money stolen from his person during the journey. The ground of the responsibility is the same as to all the passengers, whether they use sleeping berths or not, though the degree of care required may be different. Some proof must be given that the carriers failed to perform the duty of protection to the passenger that is implied in the contract, before the question of responsibility can arise, whether the passenger be in one of the sleeping berths, or in a seat in the ordinary car. The principle upon which the responsibility rests is the same in either case, though the degree of care to which the carrier is held may be different. That must be measured by the danger to which the passenger is exposed from thieves, and with reference to all the circumstances of the case. The carrier of passengers by railroad, whether the passenger be assigned to the ordinary coaches or to a berth in a special car, has never been held to that high degree of responsibility that governs the relations of innkeeper and guest; and it would, perhaps, be unjust to so extend the liability, when the nature and character of the duties which it assumes are considered. But the traveler who pays for his passage, and engages a room, in one of the modern floating palaces that cross the sea or navigate the interior waters of the country, establishes legal relations with the carrier that cannot well be distinguished from those that exist between the hotel keeper and his guests. The carrier in that case undertakes to provide for all his wants, including a private room for his exclusive use, which is to be as free from all intrusion as that assigned to the guest at an hotel. The two relations, if not identical, bear such close analogy to each other that the same rule of responsibility should govern. We are of the opinion, therefore, that the defendant was properly held liable in this case for the money stolen from the plaintiff, without any proof of negligence. The judgment should be affirmed. All concur.

Judgment affirmed.

CURTIN v. WESTERN UNION TELEGRAPH COMPANY.

*Supreme Court, Appellate Division, First Department, New York,
January, 1897.*

DELAY IN DELIVERING TELEGRAM—MENTAL DISTRESS—DAMAGES NOT RECOVERABLE.—A person cannot recover damages for

mental distress, or for physical suffering arising therefrom, caused by delay in the delivery of a telegram.

Mitchell v. Railroad Co. 151 N. Y. 107, followed (1).

APPEAL by defendant from Appellate Term. At the Trial Term of the City Court of New York, judgment was rendered for plaintiff, which was reversed by the General Term, which latter judgment was reversed by an order of the Appellate Term.

RUSH TAGGART, for appellant.

LYMAN W. REDINGTON, for respondent.

The sole question considered was whether plaintiff can recover damages for mental distress, causing, as claimed, physical suffering. This is disposed of adversely to plaintiff, both upon principle and authority. A late case in the Court of Appeals, *Mitchell v. Railroad Co.*, 151 N. Y. 107 (2), settles the rule as applicable to actions for personal injuries occasioned by negligence. The principle of that case is *a fortiori* applicable to this case. Plaintiff's recovery rests solely upon the defendant's negligence in the performance of a duty which it owed to her as the addressee of the telegram. There was no contractual relation between the parties. The contract was made in St. Louis, Mo., with the plaintiff's brother. He was the sender of the dispatch and paid for the service. There certainly could be no recovery for mental distress occasioned by a breach of that contract. The only contract for the breach of which a *solatium* may be allowed is a contract to marry. Even the latter is but nominally an exception to the rule. Though, in form, an action for breach of promise of marriage is upon contract, it essentially sounds in tort (3).

The present case aptly characterizes the looseness which usually attends sympathetic departure from settled principles. The action was tried upon a stipulation as to the facts. All that the trial judge

1. This case is reported in this volume, which see.

2. In *Mitchell v. Railroad Co.*, 151 N. Y. 107, 45 N. E. Rep. 354, it was held that although a miscarriage and consequent illness resulted from fright occasioned by the negligent management of the defendants' car and horses, yet plaintiff could not recover, for the reason that there was no immediate personal injury. The horses' heads, though in close proximity to plaintiff's person, did not actually touch it.

3. The court criticised and disapproved the rule governing this class of cases in Texas and other States. The same rule, allowing compensatory damages for mental suffering caused by a telegraph company's failure to promptly deliver messages, was formerly adopted in the Federal Court in Texas in *Beasley v. Telegraph Co.*, 39 Fed. Rep. 182, but the contrary doctrine was ultimately held by the Circuit Court of Appeals for that circuit in *Telegraph Co. v. Wood*, 13 U. S. App. 317, 6 C. C. A. 432, 57 Fed. Rep. 471.

knew about the plaintiff's injuries was embodied in this stipulation, namely, "9. That the plaintiff, after she learned from the said Thomas O'Connor, on the 15th day of July, of the death of Cornelius Curtin, on the 12th of July, in St. Louis, and of his burial there on the 14th, became sick in consequence thereof, and because she was not able to be present at his death and burial, and in said sickness expended the sum of \$20 for medical services and of \$5 for medicine, and had also expended the sum of \$60 for clothing, as alleged in said amended complaint, which she otherwise would not have expended if she had known that she could not be present at the funeral of her said brother."

Upon these facts the trial judge made this finding: "13. That the plaintiff was damaged to the amount of \$125." The award was simply, in part, at least, a *solatium*, where a *solatium* is inadmissible. The award was uncertain and devoid of substantial foundation.

Order of Appellate Term reversed, and order of General Term of the City Court affirmed, and judgment absolute ordered for defendant with costs in each court. All concur.

Opinion by BARRETT, J.

POHLE v. SECOND AVENUE RAILROAD COMPANY.

Supreme Court, Appellate Division, First Department, New York, January, 1897.

BOARDING STREET CAR—ALLEGED CONTRADICTORY STATEMENTS BY PLAINTIFF—RAILROAD COMPANY LIABLE.—In an action for damages sustained while attempting to board a street car of defendant's, where there was conflicting evidence as to whether the car was in motion or not, the question was for the jury to determine, and although plaintiff testified on the trial that the car was not in motion, but prior to the trial signed a paper contradictory thereof, the contents of which, however, plaintiff claimed he was ignorant, the weight of evidence was held not to be against plaintiff.

Van Brunt, P. J., and Barrett, J., dissenting.

APPEAL by defendant from judgment entered for plaintiff at Trial Term, New York county. The facts appear in the opinion.

PAYSON MERRILL, for appellant.

CHARLES STECKLER, for respondent.

INGRAHAM, J.—We think the questions in this case were for the jury, and that, they having been presented in a charge which was

fully as favorable to the defendant as the evidence justified, the judgment should be affirmed. The plaintiff testified: That he stood where the car was accustomed to stop, about thirty feet from the junction of East Broadway and Chatham Square, waiting for a car of the defendant's line. That, as the car came up, the conductor and driver were both in the front, engaged in conversation. That the car stopped. That he had two bundles, one of which he put on one of the seats of the car, and then put his left foot on the step. That, as soon as he got his foot on the step, the car moved on. That the conductor then shouted, "Look out for the wagon!" That he (plaintiff) did not see the wagon, but was squeezed between it and the car, and was thrown back. The car was one of the open cars, with a step running along its whole length, which affords means of access.

It is not disputed that, if the testimony of the plaintiff is to be believed, the jury were justified in finding the verdict which they did. It is claimed, however, that the verdict is against the weight of evidence, because it is contradicted by the conductor who was on the car, and one Dennis Martin, who was a passenger, both of whom testified that the car was in motion, and that the plaintiff endeavored to board the car without waiting for it to stop. A paper was also produced, signed by the plaintiff, which states that, when the plaintiff was getting on the car, the car was going fast. We have thus a case where a person who is injured swears positively that, before he attempted to board the car, it came to a stop; the evidence of the conductor that the car did not stop, his testimony being corroborated by a passenger on the car; and the production of a paper, signed by the plaintiff, which corroborates the testimony of the conductor. I think that if this paper had been written out by the plaintiff himself, as his voluntary statement, made shortly after the accident,—corroborated, as it is, by the conductor and the other witness,—a different case would be presented. This paper, as it was prepared, is not entitled, however, to the same credit as one prepared in that way. It is not pretended that the plaintiff wrote it. What happened was this: The plaintiff went to the railroad company, to complain of the accident, and to demand some compensation for his injury. He was met there by a person who describes himself as complaint clerk of the Second Avenue Railroad Company, and says that he is employed by the defendant to look up accident cases, to secure witnesses, and to prepare defenses for the railroad company. When this plaintiff appeared, he was referred to this individual, who at once took up a blank containing printed forms of questions, and filled out what purported to be the

answers of the plaintiff to those questions; and to that the plaintiff put his signature. Babcock, the person who wrote the statement, swears that he put down in it nothing but what the plaintiff told him, and that the plaintiff told him, and that he read it over to the plaintiff. The plaintiff swears that Babcock read the paper to him, but that he (the plaintiff) did not know what was put down. It is quite evident that the weight to be given to a paper prepared in this way, which was not read by the plaintiff, and as to which we have only the word of this employee of the defendant, whose duty it was to look up accident cases, to secure witnesses, and prepare defenses for the railroad company, is quite different from that to be given to a paper written out by a party, and purporting to state the facts as they occurred. This man assumed that he had some claim against the railroad company, and went there to enforce it. Babcock, in the performance of his duty of preparing a defense for the railroad company, undertook to obtain from the plaintiff a statement which would exonerate the company from liability. A paper obtained from a person under such circumstances is certainly so open to suspicion as to require that the weight to be given to it should be determined by the jury. The inherent probability is rather in favor of the plaintiff. He stood on the corner, motioning for the car to stop. He says the car stopped. The conductor says it did not stop. No reason is given to show why the driver refused to stop and take this passenger on board. It seems to have been on a street corner. The railroad is operated for the purpose of carrying passengers. The car was almost empty. It does not appear that the car was late, or that there was any reason to hurry; and, under ordinary circumstances, the probability would be that the car would stop to allow a passenger to get on board. The conductor says that the car did not stop; that the plaintiff came running from the sidewalk behind an ice wagon, and attempted to board the car, when he fell down opposite the ice wagon. The witness Martin, who was a passenger on the car, also testified that the man got on, and stood on the steps of the car; that he then fell down, and after that the conductor picked him up; that the car had not come to a stop when the plaintiff endeavored to get on. This was all the evidence, it being conceded that the driver was dead.

The court left it to the jury to say whether or not the car had stopped when the plaintiff attempted to get on, and instructed them that, if the car was in motion, it was negligence for the plaintiff to attempt to board the car. Taking the evidence as a whole, the plaintiff's story is not at all improbable. The jury heard him tell his story, could notice his manner in testifying, and could judge of

the credibility to be given to his testimony. They also heard the conductor and the passenger and the employee of the company who got the statement from the plaintiff. We are not required to say that we approve the decision of the jury upon the question submitted to them; and, while this may be a close case, upon the whole testimony we do not think that there is such a plain preponderance of evidence as would justify us in setting aside the verdict, on the ground that it was against the weight of evidence.

A motion was made for a new trial, upon the ground that the decision was against the weight of evidence. If the trial judge, having had the witnesses before him, being familiar with the occurrences at the trial, had set aside the verdict, on the ground that it was against the weight of evidence, it does not follow that we should interfere with this exercise of his discretion. He, however, has denied the motion, and we think, upon the whole record, that we would not be justified in ordering a new trial upon that ground.

The judgment should, therefore, be affirmed, with costs.

RUMSEY and O'BRIEN, JJ., concur.

VAN BRUNT, P. J. (dissenting).—The only ground presented upon this appeal for a reversal of the order and judgment is that the verdict was against the weight of evidence. The plaintiff swore: That he resided in Astoria, and had lived there for eighteen years; was sixty-eight years of age; and his business was that of sieve manufacturer. That on the 2d of September, 1893, he was in the city of New York, and, after transacting some business in Water street, he went up to Chatham Square, to go home, and waited on Oliver street, at Chatham Square, for a Second avenue car to come, these cars running to the Astoria ferry. When the car came in sight, he hailed the conductor and driver to stop the car. They were both engaged in conversation on the front platform. The car stopped. The plaintiff had two bundles, one in his right hand, and the other upon the ground. When the car stopped, he put the bundle he had in his right hand into the second seat from the end of the car. He then took up his other bundle, and got his left foot on the platform of the car, and, as soon as he got his foot on, the car started. That he could not "come in so quick in the car," and then the conductor shouted to him, "Look out for the wagon!" He did not see any wagon, and was squeezed between the car and the wagon, and thrown back, and his hands were squeezed, and his shoulder was hurt, by tumbling down behind. The car then stopped, and the conductor jumped down, and took him by the hand, and lifted him into the car, and went on. No horses were attached to the wagon. There was a step running alongside of the car, and the

plaintiff testified that he had his left foot on the step, and that he got the bundle, and wanted to get in when the car started suddenly. There were only three persons on the car at the time,— the driver, the conductor, and one passenger. The driver died before the trial.

The conductor testified that the car was going up towards Oliver street, passing Chatham Square, when the plaintiff came running from the sidewalk, behind an ice wagon; that as he stepped upon the car, the car being in motion at the time, and going fast, he fell down, opposite the ice wagon; that the conductor was on the other side of the car, on the west side, about the center of the car. He testified: "I was after strapping up a big curtain that dropped down, and I was going to the tail end of the car when I seen this man running for the car. He deliberately stepped on the board, and fell right opposite this ice wagon, and I went to his assistance, and assisted him." He further testified that the plaintiff told him that he had motioned to the driver to stop, but the driver did not see him, and that the car was still going on when the plaintiff fell off. He further testified that the car was abreast of the ice wagon at the time the plaintiff fell, and that, about the time the car came to the ice wagon, he was on the step. It is urged, upon the part of the counsel for the respondent, that this story of the conductor could not possibly be true, because there was no room between the step of the car and the wagon for him to get on if the car was abreast of the ice wagon at the time. But it is manifest, upon considering the testimony of the conductor, that this was not his statement. He said that the plaintiff ran out from behind the ice wagon, and that at the time he fell the car was abreast of the wagon, but that, when the car reached the wagon the plaintiff was on the step. The other witness was one Dennis Martin, the driver of a coal wagon. He was on the car at the time of the happening of this accident, sitting on the back seat of the car, on the west side. He testifies that the man got on, and stood on the step of the car. "I couldn't say did he knock against the ice wagon, or did he fall down himself, but he fell down, and after that the conductor picked him up, and put him on the car, or took his arm, getting on the car again. The car had not come to a stop when the plaintiff endeavored to get on. It was not to a stop. The car was moving at the time he stepped on it. The car was three or four feet above this ice wagon, as nearly as I can remember, when the plaintiff tried to get on." The witness states that he gave his name to the conductor after the accident.

The defendant also procured a statement of the manner of the happening of the accident signed by the plaintiff. It appears from

the evidence of David E. Babcock that he was employed by the defendant to look up accident cases, to secure the witnesses, and prepare defenses for the railroad company, and that the plaintiff came to the depot of the railroad company, to his office, about two weeks after the accident; that the plaintiff told him that he had been injured, and he took out a paper, and the plaintiff dictated a statement to him, and he wrote it down as he dictated it. He did not put anything in that paper that the plaintiff did not dictate to him, not a word. He further says that he handed the statement to the plaintiff after it was written, and the plaintiff handed it back to him and told him to read it, and that he did read it to the plaintiff, and the plaintiff thereupon signed the statement. In that statement the plaintiff says that the car was in motion at the time he attempted to get on. The plaintiff states:

"I didn't make any statement. A gentleman asked me how the things was, how things was going on; and I answered him, and he took my answers down. I did not read them. He read that, and I says, 'That is all correct so far, but you don't put in that I get thrown down, and get my head hurt behind;' and he put that in, and read it, and he says, 'Now sign that,' and I put my name down. I don't know what he put down. It might be he put so many things in it which I did not say. He read it over once."

The question involved is whether, upon this condition of the evidence, a verdict in favor of the plaintiff should be allowed to stand. It seems to me that it should not. There is nothing tending to impeach the action of the witness Babcock. The plaintiff, after swearing that he made no statement, admits that he did; that he made corrections in the statement; that it was read over to him; and that he signed it as correct. The conductor and the passenger upon the car both agreed that the car was in motion when the plaintiff attempted to board it, and the statement signed by the plaintiff corroborates this testimony. It seems to me that where there are two unimpeached witnesses, supported by the written statement of the plaintiff, opposed only by the unsupported testimony of a party to the suit, the verdict in favor of the latter should not be allowed to stand.

It is alleged that a mistake was made in the taking of this statement, in that the plaintiff is made to say that he was a silk manufacturer, whereas he was a sieve manufacturer. But the similarity in the sound of the words is certainly sufficient to account for this discrepancy. There is nothing whatever upon this record to impeach the integrity of the statement of the witness Babcock, and it is not to be assumed that he was guilty of the gross fraud of pretending to

read to the plaintiff a statement which did not really exist. It is much more probable that the plaintiff has, since his visit to the office of the railroad company, become aware how necessary it was for him, in order that he should succeed in an action against the company, that the car should have stopped. While verdicts of juries should not be disturbed without good cause shown, in a case like the present, where the weight of evidence is all one way, it does not seem to me that the court should refuse, in the interests of justice, to exercise the right which it has to supervise such verdicts.

The judgment and order appealed from should be reversed, and a new trial granted, with costs to the appellant to abide the event.

BARRETT, J., concurs.

Judgment affirmed.

DISTLER v. LONG ISLAND RAILROAD COMPANY (1).

Court of Appeals, New York, January, 1897.

BOARDING SLOWLY MOVING TRAIN NOT NEGLIGENCE *PER SE*.—

Where a person, at the invitation of a conductor, attempted to board a slowly moving train which did not stop at a station, and was injured in so doing, such act on his part could not be held to be negligent *per se*.

PROBABLE CAUSE.—Where a person was injured while boarding a moving train, the attempt to board the train was not the proximate cause of the injury, but the sudden jerk which threw plaintiff off the train.

APPEAL by plaintiff from judgment dismissing the complaint in the Supreme Court, General Term, Second Department. The facts are stated in the opinion.

T. R. GILBERT, for appellant.

W. C. BEECHER, for respondent.

MARTIN, J.—This action was to recover damages for personal injuries alleged to have been caused by the defendant's negligence. On the 21st day of June, 1892, the plaintiff was at Manhattan Crossing, awaiting a train by which to reach Deer Park. Manhattan Crossing is a regular station upon the defendant's road, where all its trains stopped going east. After remaining a short time, a train arrived going in an opposite direction, when the plaintiff inquired of the conductor the time of the next train going to Deer Park, who replied that he would return with his train in thirty or thirty-five

1. Reversing 28 N. Y. Supp. 865, 6 Am. Neg. Cas.

minutes and stop for him. The train returned, and while passing slowly along the platform, at the rate of two or three miles an hour, the conductor bade the plaintiff get on. At the time the plaintiff was on the station platform, and, in compliance with the direction of the conductor, stepped upon the steps leading to the forward platform of the second car, passed on until one foot was upon the platform and the other was upon the first step below, when the train started with a sudden jerk or lurch, which threw him from the car, and he was seriously injured. When the plaintiff rested, the defendant moved to dismiss the complaint upon the grounds that no negligence on its part had been proved, and that the plaintiff was guilty of contributory negligence. The motion was granted. The plaintiff then asked the court to submit the case to the jury upon the facts established by the evidence, which was denied on the ground that the plaintiff was guilty of contributory negligence, as a matter of law. To that ruling the plaintiff duly excepted. In making it the court apparently relied solely upon the case of *Hunter v. Cooperstown, etc. R. R. Co.*, 126 N. Y. 18, 26 N. E. Rep. 958 (1). The question to be determined in this case is whether, as a matter of law, the plaintiff was guilty of contributory negligence in getting onto the train, in pursuance of the direction of the conductor, while it was moving at the rate of two or three miles an hour, when there was nothing to indicate any unusual or peculiar danger. Inasmuch as the decisions of the Trial Court and General Term seem to be based upon the Hunter Case, it is proper to examine the decisions of this court in that case, to ascertain whether the principle there decided upholds the determination of the courts below.

When the Hunter Case was in this court on the first appeal, it was reversed upon the ground that the plaintiff was guilty of contributory negligence in boarding a train moving at the rate of from four to six, or six to eight miles an hour, although he was within three or four feet of an elevated freight platform, which was only about six inches from the side of the moving car. The opinion on the first appeal discloses that the decision was then based chiefly upon the rapidity with which the train was moving when the intestate attempted to get on; the court, in effect, holding that to board a train moving from four to six, or from six to eight, miles an hour, was so dangerous and hazardous that it must be regarded as negligence, as matter of law, notwithstanding the conductor directed him to do so. At the same time it recognized the fact that there were cases in which an attempt to get off or on a moving train would

1. *Hunter v. Cooperstown, etc. R. R.* Neg. Cas. 289. See also previous decision in 5 Am. Neg. Cas. 280.

not be regarded as negligence *per se*, and where the question of negligence, upon all the facts, should be submitted to the jury. When the case was in this court upon a second appeal, it appeared by the record that there had been a change in the evidence, so that the train was described as moving at the rate of from one to two, instead of from four to six, or six to eight, miles an hour. The court reversed the judgment upon the ground that the plaintiff's intestate was negligent, and that his act contributed to his death. This conclusion seems to have rested principally upon the presence of an elevated freight platform in close proximity to the place where the intestate attempted to board the moving car, so that, in case of a misstep or other slight accident, his injury from contact therewith was almost, if not absolutely, certain. The court, however, again recognized in its opinion the existence of cases where an attempt to board or alight from a moving train would not be regarded as negligence, as a matter of law, but stated that that was not one of those cases. I think it may be said of the decisions in that case that in the first it was held that it was negligence *per se* to board a train moving from four to six, or six to eight, miles an hour, on account of its comparative rapid motion; and, in the second, as the danger was manifest, unusual, and peculiar, and must have been seen and understood, that, although moving at a less rate of speed, it was negligence, as a matter of law, to attempt to board it while in close proximity to a prominent obstruction, so situated that in case of failure, or of a misstep or other slight misadventure, the risk of being thrown against the obstruction and injured would be imminent. It is obvious that the facts upon which the decisions in the Hunter Case were based are essentially unlike those in the case at bar. Upon the first appeal in that case the train was shown to have been moving at a rate of speed greatly in excess of that at which a person would ordinarily walk, and in the second the proof was that, while the train was moving less rapidly, still the attempt to board it was manifestly attended with such peculiar and certain danger from surrounding obstacles as to make it negligence to do so. Neither of those conditions exists in this case. Here the train was moving at a rate of speed not greater than an ordinary walk. There was a long platform at the station, unobstructed, with nothing to indicate that any unusual danger was to be apprehended in stepping upon the train. Thus, it is apparent that the Hunter Case is plainly distinguishable from the case at bar, and that the decisions in that case do not sustain the determination of the courts below. Unless this court shall hold that it is negligence *per se* to step upon a moving train, no matter how slight its motion, this judgment cannot be

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upheld. We think the decisions in the Hunter Case have gone to the fullest limit to which this principle should be extended. It is a matter of common knowledge that it is of daily occurrence that ordinarily prudent persons safely board a train or car moving at two or three miles an hour. We are not prepared to hold that it is negligence *per se* to step upon a train moving at that rate of speed. To do so would encroach upon the proper province of a jury. There is another distinction between this and the Hunter Case. In this case the proof discloses that the conductor was in entire charge of the train, as the representative of the defendant. When the train first passed, he informed the plaintiff that upon his return he would stop, so he could take the train to Deer Park. He doubtless had authority to make that agreement. In pursuance of it, the plaintiff remained at the station until the train returned, when, while the train was going at a rate of speed which appeared to render it reasonably safe, he complied with the direction of the conductor, and boarded it. We are not prepared to hold that, under those circumstances, the direction of the conductor was of no importance. While it was held in the Hunter Case that such a direction was unimportant where it was manifest that to comply with it was imminently dangerous, yet here, as no such condition existed, that principle has no application.

There is another ground upon which we think the judgment should be reversed. Even if it were assumed that the plaintiff was negligent in stepping upon a moving train, yet it cannot be held, as a matter of law, that such negligence, in any proper sense, contributed to his injury. The danger which attended the boarding of a moving train had been passed. The plaintiff was upon the train, and in a situation of safety, unless there was an accident, or some mismanagement. His injury can hardly be said to be the proximate result of stepping upon the moving train, or to have been occasioned by his inability to safely reach a seat because the car was in motion. The direct and proximate cause of his injury was the mismanagement of the train, causing a sudden jerk or lurch which threw the plaintiff therefrom, or at least the question whether that was the cause was a question of fact for the jury. We are of opinion that the questions of the defendant's negligence, and the plaintiff's freedom from contributory negligence, were, under the evidence, questions of fact, and should have been submitted to the jury. The judgment should be reversed, and a new trial granted, with costs to abide the event.

GRAY, J. (dissenting).— I dissent from the conclusion reached by the majority of my associates, because, in all the main and material facts, this case cannot be distinguished from the Hunter Case, 112

N. Y. 371, 19 N. E. Rep. 820 (1); *Id.* 126 N. Y. 18, 26 N. E. Rep. 958 (2),— which, in turn, rested upon the principle decided in the Solomon Case, 103 N. Y. 437, 9 N. E. Rep. 430 (3). This train was a special train, which was not scheduled to stop at the station, and upon which the plaintiff had no right to be carried. The plaintiff elected to leave his place of safety, and to incur the peril of boarding a moving train, for some purpose of convenience, upon the invitation of his friend, the conductor of the train. These were also the facts in the Hunter case, upon consideration of which this court determined that the plaintiff was guilty of contributory negligence, and therefore should have been nonsuited. The distinction attempted now to be made between the cases does not amount to a substantial difference. It seems to me that, in making this distinction, we are unnecessarily introducing uncertainty in the law for the government of trial courts in negligence cases.

ANDREWS, C. J., and O'BRIEN, BARTLETT, and VANN, JJ., concur with MARTIN, J., for reversal. GRAY, J., reads for affirmance, and HAIGHT, J., concurs.

Judgment reversed.

ANDERSON V. BOYER, ET AL.

Supreme Court, Appellate Division, First Department, New York, January, 1897.

TRUCKMAN INJURED BY FALL OF TANK—QUESTION AS TO FELLOW SERVANT.—Where plaintiff was engaged as a truckman, and while waiting to transport goods when unloaded, was asked by the captain of a lighter to assist in handling a heavy tank belonging to defendant, but the rope breaking the tank fell upon plaintiff and injured him, defendants were liable, and could not be excused on the plea that the captain and the truckman were fellow-servants because the contractor who hired the lighter also employed plaintiff as truckman.

Ingraham, J., dissented.

APPEAL by defendant from judgment rendered for plaintiff, and from order denying motion for new trial, at the Trial Term, New York county.

J. HAMPDEN DOUGHERTY, for appellants.

J. EDWARD SWANSTROM, for respondent.

1. Reported in 5 Am. Neg. Cas. 280.
2. Reported in 5 Am. Neg. Cas. 289.
3. *Solomon v. Manhattan R. Co.* 103 N. Y. 437, is reported in 5 Am. Neg. Cas. 261. See also 5 Am. Neg. Cas. 401.

Plaintiff was injured by the falling upon him of a heavy tank which was being unloaded from a lighter upon a dock at Newark, N. J. The defendants were the owners of the lighter, and had undertaken by contract with one Schaenawelf to transport certain goods from New York to Newark for him, or to carry the goods for him upon some other contract (1). Among the articles to be carried was the tank in question. For the purpose of unloading this tank it had been swung by ropes from the boom of the lighter; and while it was thus swinging, the rope broke, and it fell upon the pier. Plaintiff's story was that he was in the employ of Schaenawelf as a truckman, and was on the dock waiting to transport the goods; that, as he stood there upon the dock, the captain of the lighter called upon him to lend a hand to the handling of the tank, and just as he stepped forward to assist, the rope broke, and the tank fell upon and injured him. The evidence seemed to confirm this version and warranted the jury in finding for plaintiff. The negligence charged was in the captain either in selecting a rope unfit for holding the weight of the tank, or in so attaching it that it was almost certain to be cut through by the weight. Defendants claimed that, conceding the facts to be as stated by plaintiff, he was a fellow-servant of the captain, and, therefore, they were not liable for the captain's negligence. It was undisputed that plaintiff was in the employ of Schaenawelf and had not been hired by, or had relations with, defendants. That being so, he was not strictly a servant of the defendants in any sense. The duty of the captain was to navigate the lighter and control the unloading of it. The plaintiff was to take charge of goods and transport them when unloaded. The captain and the plaintiff were not hired by the same person, and they were not engaged in the same employment. Therefore, defendants were not relieved from responsibility to plaintiff for the negligence of the captain because the two were co-servants. (Citing *Swenson v. Steamship Co.*, 57 N. Y. 108; *Sanford v. Oil Co.*, 118 N. Y. 571, 24 N. E. Rep. 313; *Kilroy v. Canal Co.*, 121 N. Y. 22, 24 N. E. Rep. 192.)

Judgment for plaintiff affirmed. INGRAHAM, J., dissenting.

Opinion by RUMSEY, J.

1. The contract in question was discussed and the evidence reviewed, and it was held that the jury were warranted in finding against the defendants. Ingraham, J., however, dissented, in a separate opinion.

HILL v. SCHNEIDER AND BRADLEY.

*Supreme Court, Appellate Division, New York, First Department,
January, 1897.*

PROPERTY INJURED BY BLASTING—WHEN INJUNCTION WILL NOT BE GRANTED.—Where an owner of a piece of land makes a contract with a firm to excavate it and the contractors sublet to another, and the subcontractor in blasting injures adjoining property, an injunction will not lie against the owner as he has no right over the action of the subcontractor.

APPEAL from Special Term, New York county, from an order denying a motion for a preliminary injunction against defendants Schneider and Bradley; the plaintiff appeals.

CHARLES DE HART BROWER, for appellant.

JOHN FRANKENHEIMER, for respondents.

Plaintiff is the lessee and in the possession of the premises known as "No. 103 West Thirty-sixth street," under a lease which expires on May 1, 1897. The defendant Schneider is the owner in fee of the premises, and is also owner of the land on Thirty-sixth street, between Broadway and Sixth avenue, extending northerly about 100 feet. He was engaged in work preliminary to the construction of an hotel, and, to that end, entered into a contract with a person who is not a defendant in this action to make the necessary excavations and erect the building. The original contractor entered into a contract with the defendant Bradley, to make the excavations. In carrying out this contract, Bradley resorted to blasting, which resulted, as plaintiff alleged, in damage to plaintiff's building. The evidence showed that there was considerable danger that plaintiff's building might be blown down if the blasting was continued, and that the course pursued by Bradley in excavating was not necessary. Upon the facts it was clear that plaintiff is entitled to an injunction restraining this blasting in the way in which Bradley proposed to do it. The rule, "*Sic utere tuo ut alienum non laedas*" is of wide application, and is a maxim of the law to which the exceptions are few. In the application of this maxim it is not intended to take away from any person the right to improve his own property in a lawful manner, but the law requires that when he shall attempt to do so, he must use it with a due regard for the rights of other people, and, in every way legally possible, he must avoid injury to those rights. If he goes beyond, he makes himself liable to respond to his neighbor in damages. (Citing *Morgan v. Bowes*, 62 Hun, 623, 17 N. Y. Supp.

22, and distinguishing *Booth v. Railroad Co.*, 140 N. Y. 267, 35 N. E. Rep. 592.)

The plaintiff did not show anything to entitle him to a preliminary injunction against the defendant Schneider, the owner of the land, and there was nothing to warrant a finding that Schneider either has done or could do any act about the blasting out of this excavation which would affect the plaintiff's rights, or, indeed, that he has any control over the excavation whatever.

The order, therefore, was affirmed as to the defendant Schneider, with \$10 costs and disbursements to be paid by the plaintiff to him, and reversed as to the defendant Bradley, with \$10 costs and disbursements to be paid by Bradley to the plaintiff, and, as to Bradley, the injunction granted, with \$10 costs to abide event.

All concur.

Opinion by RUMSEY, J.

FEJDOWSKI v. PRESIDENT, MANAGERS AND COMPANY OF THE DELAWARE AND HUDSON CANAL COMPANY.

Supreme Court, Appellate Division, Third Department, New York, January, 1897.

KILLED ON RAILROAD TRACK — EVIDENCE — CONTRIBUTORY NEGLIGENCE.—Circumstantial evidence is admissible to prove absence of contributory negligence, and where a person was killed while crossing a track with his team, the question of contributory negligence is for the jury to determine from the facts.

APPEAL from judgment of nonsuit entered at the Trial Term, Schenectady county.

DANIEL NAYLON, JR., and EDWARD C. WHITMEYER, for appellant.

LEWIS E. CARR, for respondent.

Plaintiff's intestate was crossing a single track of the defendant's road, at Edison avenue in Schenectady, on a wagon, driving two horses. When he got to within about twenty feet of the track, he stopped to allow a freight train to pass him. It was in the nighttime, and very dark. After the train had passed about 100 feet, plaintiff's intestate started his team, and drove onto the track, and was there caught by an engine following the freight train, and killed.

The engine was backing up, without any light on its rear end. It gave no signals, either by bell or whistle, was not emitting any sparks or steam, and was running at the rate of twenty-five or thirty miles and hour. Plaintiff was nonsuited at the trial on the ground that the evidence did not sufficiently show absence of contributory negligence on the part of the deceased. While there was no direct evidence that deceased did or did not look before he drove onto the track, to see if anything was following such train, it did not appear that, had he looked, he would have had an obstructed view, save for the darkness, for about 1,000 feet along the track in the direction from which the engine approached. It was the duty of plaintiff to show affirmatively that the negligence of deceased did not contribute to the injury (citing *Tolman v. Railroad Co.*, 98 N. Y. 198), but as no one was with deceased and no one saw him as he passed onto the track, direct proof of care on his part is not indispensable as the circumstances may show that proper care was exercised. Citing *Cordell v. Railroad Co.*, 75 N. Y. 330, and *Wiwirowski v. Railroad Co.*, 124 N. Y. 420 (1). The circumstances under which deceased met his death were as follows: An intensely dark night; a freight train just passed; an engine following on the same track, within 100 or 200 feet of such train, at the rate of twenty-five or thirty miles an hour, running backward, and without a car attached, no light on the rear end; no signal of any kind given; emitting no sparks, and making little or no noise, while the noise of the passing train was still to be heard; in short, an engine passing so stealthily that a man who was on the sidewalk, between the deceased and it, although watching for a coming train, did not see or hear it until it passed within five feet of him. In addition, it must be considered that a certain amount of deceased's attention must have been given to his horses. It cannot be said, as matter of law, that such circumstances do not reasonably indicate, or tend to establish, that the accident might have occurred without negligence on the part of deceased.

The facts as to negligence were for the jury to determine.

Judgment reversed and new trial granted. All concur.

Opinion by PARKER, P. J.

1. The case of *Wiwirowski v. Railroad Co.*, 124 N. Y. 420, 26 N. E. Rep. 1023, was distinguished from the case at bar.

ANDERSON v. NEW YORK AND CUBA MAIL STEAMSHIP COMPANY (1).

*Supreme Court, Appellate Division, First Department, New York,
January, 1897.*

FALLING THROUGH HATCHWAY — CONTRIBUTORY NEGLIGENCE.—

Where plaintiff, a seaman on board one of defendant's vessels, was directed to close certain ports of the vessel, and in doing so attempted to walk across a hatchway which was partly open, the fact being known to plaintiff, and there was sufficient light to disclose the opening, and he fell through and was injured, he was precluded from recovering damages, being guilty of contributory negligence.

NEGLIGENCE OF FELLOW-SERVANT.—In such action it was held, per Barrett, J., that the plaintiff, who acted under orders from an officer of the vessel whose duty it was to see the hatchway was closed, was a fellow-servant of such officer, and hence the negligence was not chargeable to the owner of the vessel (2).

APPEAL from trial term, New York county. From a judgment entered on a verdict, and from order denying motion for new trial defendant appeals.

L. C. LEDYARD, for appellant.

JACOB FROMME, for respondent.

Plaintiff was injured on one of defendant's vessels upon which he had been engaged as seaman for eight months. The accident which happened on December 17, 1889, occurred on board the Cienfuegos, while in port. Plaintiff was called upon to assist the carpenter in closing certain ports of the vessel between decks, through which cargo had been discharged during the day. At the time plaintiff was on the main deck. He then, with the carpenter, went down to the lower deck through the forward hatch, and then aft. He noticed a couple of boilers that lay upon the deck upon which he was to close the ports, forward of the hatch through which he fell. He walked alongside one of the boilers to the port on the port side of the vessel, and closed the same, and then went across the hatch in question, to the port on the starboard side, and closed it. Prior to the closing of the ports there was abundance of light between

1. Reversing 39 N. Y. Supp. 425.

2. Citing *Benson v. Goodwin*, 147 Mass. 238, 17 N. E. Rep. 517; *Rogers v. Manufacturing Co.*, 144 Mass. 198,

11 N. E. Rep. 77; *The City of Alexandria*, 17 Fed. Rep. 390; *Geoghegan v. Steamship Co.*, 146 N. Y. 369, 40 N. E. Rep. 507.

decks, but when the starboard port was closed it was so dark that nothing could be seen. Plaintiff then started to go forward to reach the hatch down which he had descended, and striving to avoid the boiler, he attempted to walk on the hatch in question, and the same being partially uncovered, he fell through. It appeared that plaintiff was acquainted with the position of the hatch, having performed the duty in question before, and that there was sufficient light to see the condition of the hatch. There seems to have been no necessity whatever for plaintiff to walk upon the hatch. It was proper for defendants to show the customary course of business upon the ship, and the exclusion of testimony on this point was error. It was reasonably clear that the question as to whether he used due diligence or not depended upon the condition of things which plaintiff had a right to expect, and the exclusion of evidence as to the condition of things excluded one of the elements by which plaintiff's diligence might be tested from consideration. Plaintiff's negligence was apparent, and he failed to show absence from contributory negligence.

Judgment and order reversed and new trial granted.

Opinion by VAN BRUNT, P. J.

DE ROZAS v. METROPOLITAN STREET RAILROAD COMPANY.

*Supreme Court, Appellate Division, New York, First Department,
January, 1897.*

BOARDING FRONT PLATFORM OF STREET CAR NOT NEGLIGENCE.—

An attempt to board a street car by the front platform, is not negligence *per se*, nor is it negligence at all where an invitation is extended by the driver to enter that way.

STARTING STREET CAR WHILE PASSENGER WAS BOARDING IT.—

It is for the jury to determine whether there was negligence in entering a street car by front platform and starting car before a passenger had time to board it.

APPEAL from Circuit Court, New York county. A new trial was granted after nonsuit, from which order defendant appeals.

JOHN T. LITTLE, JR., for appellant.

CHARLES N. MORGAN, for respondent.

Action by plaintiff to recover for injuries sustained while boarding one of defendant's horse cars. At the trial plaintiff was nonsuited, but upon a motion for a new trial upon the judge's minutes, the

nonsuit was set aside and new trial granted. The sole question presented is as to the sufficiency of evidence to warrant the case being submitted to the jury. The plaintiff testified that she boarded defendant's car on Twenty-third street, and that the conductor invited her to enter by front platform and told her to "hurry up." Her daughter entered first, but while plaintiff was entering the car suddenly started and she was thrown against the side of the car, striking her arm against the door handles and was severely injured. There was sufficient evidence to justify placing it before a jury, and nothing was shown to charge plaintiff with contributory negligence. The attempt to mount the front platform when the car was standing still was certainly not negligence, as a matter of law; nor could it be said to be negligence at all in view of the fact that plaintiff was invited by the driver to enter that way. As to the starting of the car before plaintiff had time to enter it, that was a question which should have been submitted to the jury (1). The case differs widely from that of *Black v. Third Ave. Railroad Co.*, 2 App. Div. 387, 5 Am. Neg. Cas. 642, 37 N. Y. Supp. 830, which was cited as in point. In that case the complaint was, not that the car was prematurely started, but that it was started with an unnecessary and violent jerk, by which plaintiff, who had succeeded in entering the car, and was standing up inside of it, was thrown down and injured. The whole point was that there was an entire failure to prove that the manner of starting the car was unusual. That point was not in issue in the case at bar.

Order granting new trial affirmed. All concur.

Opinion by RUMSEY, J.

MURPHY v. METROPOLITAN STREET RAILWAY COMPANY.

*Supreme Court, Appellate Term, First Department, New York,
January, 1897.*

INFANT ALIGHTING FROM CAR—NEGLIGENCE FOR JURY.—Where plaintiff, an infant, in the custody of his father, was thrown to the street by the alleged sudden start of the car while he was attempting to alight under

1. The court cited *Keating v. N. Y. Cent. R. Co.*, 49 N. Y. 673, 5 Am. Neg. Cas. 170; *Morison v. Broadway, etc. R. R. Co.*, 8 N. Y. Supp. 436, which was affirmed in 130 N. Y. 166, 5 Am. Neg. Cas. 353, 29 N. E. Rep. 105; *Ganiard v. Rochester, etc. R. Co.*, 50 Hun, 22, 2 N. Y. Supp. 470, 5 Am. Neg. Cas. 450, affirmed in 121 N. Y. 661, 24 N. E. Rep. 1092.

his father's direction, and there was conflicting testimony as to the cause of the accident, the question of negligence was for the jury to determine.

APPEAL by defendant from judgment rendered for plaintiff in the Ninth District Court, New York city.

BRONSON KER, for appellant.

EUGENE SONDEHEIM, for respondent.

Action for damages for injuries sustained by plaintiff, an infant, while alighting from one of defendant's cars. It was shown on behalf of plaintiff that at the time of the accident he was a passenger, in the custody of his father, and while alighting by his father's directions, at or about the intersection of One Hundred and Ninth street with Columbus avenue, the car suddenly started and he was thrown to the ground. The father and another witness testified to the car stopping to permit passengers to alight, that a number of passengers alighted, and that while both the father and the child were attempting to alight the car suddenly started and the boy was injured. Negligence and the absence of contributory negligence sufficiently appeared from this evidence to support the recovery, since the plaintiff's attempt to alight was justified by the continued immobility of the car; and the condition became one of danger only because of the act of defendant's servants, who were required to give passengers a reasonable time in which to alight before causing a start (1). There was conflicting testimony as to whether the car had stopped or plaintiff attempted to get off while it was in motion or was thrown off by the car turning a switch, warning of which was given to the passengers, but the facts favored plaintiff's version of the accident and was sustained by the evidence. Appellant having permitted the introduction of evidence as to payment of medical expenses by plaintiff's father, without objection, cannot raise the point on appeal. In view of the evidence as to plaintiff's injuries the amount of the judgment, \$76, was not excessive.

Judgment affirmed.

Opinion by BISCHOFF, J. All the judges concurred.

1. Citing *Poulin v. Erie R'y Co.*, 61 N. Y. 621, 5 Am. Neg. Cas. 203-205, where it was held to be the duty of a street car conductor to give passengers a reasonably safe opportunity to alight, and must stop the car a reasonable time for that purpose, and if he starts it before the passenger has alighted or had reasonable time for that purpose, it is negligence.

FROBISHER v. FIFTH AVENUE TRANSPORTATION COMPANY (1).

Court of Appeals, New York, January, 1897.

INJURED WHILE BOARDING STAGE COACH — ALLEGED DEFECTIVE STEP — CARRIER NOT LIABLE.— Where plaintiff was injured while attempting to board one of defendant's stages, which had nearly stopped to receive him, but was started with a jerk as he was boarding the step, and it was alleged that the stage steps were negligently constructed, the company could not be held liable simply because the step used was an open one and that in other cities stages used closed steps, it being shown that both kinds of steps were in general use, and further, that no accident had occurred before by reason of the use of such step (2).

DAMAGES.— An allegation in the complaint that the plaintiff "has become disabled for life to such an extent as to seriously interfere with the active prosecution of his business," is sufficient for the purpose of proving special damages (3).

APPEAL by defendant from judgment rendered for plaintiff in Supreme Court, General Term, First Department, New York, November, 1894. The facts appear in the opinion.

WILLIAM IRWIN, for appellant.

J. TREDWELL RICHARDS, for respondent.

HAIGHT, J. This action was brought to recover damages for a personal injury. On the 14th day of October, 1889, the plaintiff was standing upon the west side of Fifth avenue, in the city of New York, just south of Twenty-third street. He signaled the driver of a Fifth avenue omnibus to stop, and the driver thereupon pulled up his horses, and nearly stopped the bus. While it was moving slowly, the plaintiff stepped aboard, taking hold of the handle at the side of the door. While standing upon the step, and before entering the bus, the driver started ahead, and the plaintiff's body was jerked backward. At that instant his foot slipped from the step under the body of the bus, his hold upon the handle loosened, and he fell

1. Reversing 81 Hun, 544, 5 Am. Neg. Cas. 599, 30 N. Y. Supp. 1099.

2. This ruling reverses the decision in 81 Hun, 544, 5 Am. Neg. Cas. 599, 30 N. Y. Supp. 1099, where it was held that this question as to the use of the step was properly submitted to the jury

on the question of negligence, and verdict and judgment for plaintiff was affirmed. Van Brunt, P. J., however, dissented.

3. This affirms the ruling in 81 Hun, 544, 5 Am. Neg. Cas. 599, 30 N. Y. Supp. 1099.

backwards, striking upon the pavement, causing the injuries for which this action was brought.

It was, among other things, charged in the complaint that the stage, or omnibus, was negligently constructed, and unfit for carrying passengers, and that such negligence caused his fall. At the conclusion of the trial the defendant requested the court to charge "that there is no proof that the step of the stage; or the stage itself, was in any way defective." To this the court replied, "You have the evidence in regard to what might have been done with known appliances with respect to the step." To this the defendant entered an exception. It was not claimed that the stage, or omnibus, was in any way defective, other than in the construction of the step by which it was entered. There was but one step, twenty-two inches long and about sixteen inches wide. It was held in position by two large braces, one on each end, and there was a corded rubber, covering the step. The back of the step was open and not closed. The charge of negligence is based upon this opening. One of the witnesses testified that the open step was used for large cities, and another that he had never seen a stage with a solid back to its step, except the hotel coaches. It is quite apparent, from the testimony given, that both kinds of steps are in general use, and that each may have its advantage and disadvantage. With the solid back step there would be no danger of the foot slipping through and catching under the bus, but it would be more liable to fill with mud and snow in traveling over the streets, and thus cause the foot to slip forward. It did not appear that any accident of the character of this had before occurred by reason of the use of the open back step. We think, therefore, that the defendant was not chargeable with negligence by reason of its use of the open step, and that its use did not render the omnibus defective. *Crocheron v. Ferry Co.*, 56 N. Y. 656 (1); *Loftus v. Ferry Co.*, 84 N. Y. 455 (2); *Laffin v. Railroad Co.*, 106 N. Y. 136, 12 N. E. Rep. 599 (3).

An exception was taken by the defendant to the introduction of evidence as to the plaintiff's income from his business before and after the injury. The objection to this evidence, however, was made upon the ground that special damages were not pleaded in the complaint. It was not objected to upon the ground that damages of

1. *Crocheron v. North Shore Staten Island Ferry Co.*, 56 N. Y. 656, is reported in 5 Am. Neg. Cas. 234.

2. *Loftus v. Union Ferry Co.*, 84 N.

3. *Laffin v. Buffalo & S. W. R. Co.*, 106 N. Y. 136, is reported in 5 Am. Neg. Cas. 268.

this character were not competent, or that they were remote or speculative. The complaint did allege interference with his prosecution of his business, from which he suffered damages. The allegation is quite general to become the foundation for the awarding of special damages, but the defendant could have had it made more specific upon motion had it so desired. The objection having been confined to the pleading, we think the question as to whether damages of that character could, in any event, be awarded, is not now raised for our consideration. But, upon the exception taken to the refusal of the court to charge, as requested, the judgment should be reversed and a new trial granted, with costs to abide the event. All concur, except BARTLETT, J., not voting.

Judgment reversed.

ALLEN v. BUFFALO, ROCHESTER AND PITTSBURGH RAILWAY COMPANY.

Court of Appeals, New York, January, 1897.

STATUTORY DUTY OF RAILROAD COMPANY AS TO HIGHWAY.—

Whether a railroad company does or does not comply with its statutory duty in keeping a highway, upon which it had cut a line of railroad, in proper condition so as not to endanger persons crossing it, is for the jury to determine.

APPEAL by defendant from judgment rendered for plaintiff in Supreme Court, General Term, Fifth Department, New York.

HENRY G. DANFORTH, for appellant.

GEORGE E. SPRING, for respondent.

The basis of the recovery in this case was the omission of the defendant to perform the statutory duty to restore a public highway to its former condition, or to such a state as not unnecessarily to have impaired its usefulness. The plaintiff, while driving upon one of the public highways of the town with a horse and carriage, was thrown out and injured. At the point in the highway where the accident occurred there was a defect which the jury could have found to have been the proximate cause of the injury. The defense of contributory negligence on the part of the plaintiff, was properly submitted to the jury, and that question has been determined against the defendant by the verdict. When the railroad bed of the defendant was constructed, about the year 1873, several rods of it were built in a public highway. In order to make a proper grade for

the railroad, the highway was cut down from seventeen to twenty-five feet below the surface, thus forming a deep cut, with sloping banks on each side, for a distance of some forty or fifty rods. The defendant, having appropriated the highway for several rods in length for its roadbed, it was, of course, impossible to restore the identical road to its former state. The statutory duty could not be performed except by the construction of a new highway at some other place. This it proceeded to do by the purchase of a strip of land south of the railroad, and immediately adjoining it, fifty feet wide; the old road being three rods in width. The new highway was constructed and laid out along the brink of the cut on the surface of the ground, and at the point where the accident occurred; the cut was some seventeen feet below the bed of the new highway. On the south bank of this cut the defendant, or some of its predecessors in title, in procuring gravel, had so affected the slope of the bank that a part of the new highway was eaten away and fell into the cut. In this way the highway was narrowed to thirty-three feet from the south boundary line to the brink of the cut, and there were no guards or fences between the highway and the cut. The surface of the road sloped quite sharply from the south line towards the cut at the place where the injury occurred, and there was a considerable bank or rise on the south, and a bend in the line of the road. At this point the horse, which the plaintiff was driving, became frightened at a passing train in the cut below, and, seeking to avoid the precipice on the north, which extended into the highway, she reined the horse to the south, and in doing so drove upon the bank or high ground, and the carriage was overturned, and the plaintiff injured. The evidence tended to show that when the horse was reined towards the south he was within a couple of feet of the unguarded declivity. In this condition of the proof the trial judge submitted all the questions to the jury, and a verdict for the plaintiff was found, which has been affirmed at the General Term (1).

The statute under consideration has frequently been the subject of judicial construction. Laws 1890, c. 565, § 11. The defendant's title to the railroad is derived from various corporations preceding it in the operation of the same, and it was one of these corporations that appropriated the old road and constructed the new one. The duty of restoration is inseparable from the franchise granted, permitting the railroad to cross the highway, or divert it from the original location. The duty, it is true, was primarily imposed upon the corporation that appropriated the highway, yet, as it was a continuing obligation, incident to the franchise when the defendant became

1. Reported in 30 N. Y. Supp. 1129.

vested with the property and its privileges, it also became burdened with the duty of restoration. The duty was not only to restore the road to its former condition, but to maintain this condition in a reasonable way, at least so far as its safety or usefulness was affected by its own acts and the ordinary operations of its business. The duty is not performed when the railroad restores the road on one day and destroys it on the next day. Though restoration may have been made, yet, if the railroad by its ordinary operations, destroys the benefits of such restoration to the public, and renders the road unsafe, or unnecessarily impairs its usefulness, the duty which accompanies the exercise of the franchise imposes upon the corporation the burden of further restoration and maintenance. Any other rule would permit a railroad, that has once complied with the statute, to destroy what it had done, or to allow it to become useless or dangerous, without being subject to any of the remedies in favor of the public that the statute contemplates. When the defendant, or the corporation whose duty it has assumed, built the road on the edge of the cut, and subsequently undermined the bank, thus causing the roadbed to slide into the cut, leaving a dangerous pit or opening in the highway, the continuing duty imposed by the statute was not complied with until the defect thus caused had been repaired, and the road made safe. The usefulness of a highway is unnecessarily impaired, within the meaning of the statute, by a railroad that has occupied it, whenever it is left in such a condition that it is reasonably probable that it will become unsafe in consequence of the new situation and new surroundings. A highway laid out on the top of a bank of gravel which is being undermined by drawing off the material for the use of the railroad track, should be so secured and guarded by proper supports and barriers as to make it reasonably certain that the roadbed will not fall into the cut; and, if the new road is left in such a state that such a result may reasonably be anticipated, the railroad has not complied with the spirit of the statute. In this case that result did occur, and the opening thus made in the road was, in the judgment of the jury, a proximate cause of the accident. The defendant, when called upon to respond in damages to the plaintiff for the injury, cannot defeat the claim by allegation that the road had once been put in proper condition, even if that fact had been found in its favor. It left the road with a frail fence on the south line of the railroad, which soon fell into decay, and disappeared, thus exposing travelers to the perils of the declivity below. It left the bank in such a condition that by the use of procuring gravel for its own purposes it could easily be foreseen that at some time the roadbed itself would be undermined, and its

safety impaired. All this might, under the circumstances, have been reasonably anticipated, and, as such dangers in the process of time became more evident, it was the duty of the defendant under the statute to guard against them, and so maintain the highway in a reasonably safe condition against all defects produced by the railroad. This we conceive to be a reasonable construction of the statute, and one that is sustained in principle by the authorities, in which the duty of maintenance, as well as of restoration, has been held to be implied in the statute (1).

It was a question for the jury to determine whether, upon either of these grounds, the statute had been complied with or not. If it had been disregarded, either in its letter or spirit, the defendant was liable for the damages resulting to the plaintiff (2).

Judgment affirmed.

Opinion by O'BRIEN, J.

MCINERNEY v. PRESIDENT, MANAGERS AND COMPANY OF THE DELAWARE AND HUDSON CANAL COMPANY.

Court of Appeals, New York, January, 1897.

PERSON IN EMPLOY OF ANOTHER INJURED BY DEFENDANT'S TRAIN.—Where a person, in the employ of another, was engaged in moving cars on a switch which connected with defendant's railroad, the defendant's crew hands being engaged when necessary to move the cars away for plaintiff's employer, and while the crew were so engaged plaintiff was hurt between cars, his presence there being unknown to defendant's servants, defendant was not liable.

MASTER AND SERVANT.—In such case it was also held that as defendant was not plaintiff's master it did not owe plaintiff any active duty of vigilance, the failure to perform which was in law negligence.

1. Citing *Cott v. Railroad Co.*, 36 N. Y. 214; *People v. N. Y. Cent. & H. R. R. Co.*, 74 N. Y. 302; *Hatch v. Railroad Co.*, 50 Hun, 64, 4 N. Y. Supp. 509; *Vaughan v. Railroad Co.*, 72 Hun, 471, 25 N. Y. Supp. 246; *State v. Dayton & S. E. R. Co.*, 36 Ohio St. 434; *Burritt v. City of New Haven*, 42 Conn. 174; *Thayer v. Railroad Co.*, 93 Mich. 150, 53 N. W. Rep. 216.

2. Citing *Bryant v. Town of Randolph*, 133 N. Y. 70, 30 N. E. Rep. 657; *Schild v. Railroad Co.*, 133 N. Y. 446, 31 N. E. Rep. 327; *Post v. Railroad Co.*, 123 N. Y. 581, 26 N. E. Rep. 7; *McMahon v. Railroad Co.*, 75 N. Y. 231; *Masterson v. Railroad Co.*, 84 N. Y. 247.

APPEAL by plaintiff from judgment dismissing complaint rendered in Supreme Court, General Term, Third Department, New York. The facts are stated in the opinion.

J. NEWTON FIERO, for appellant.

LEWIS E. CARR, for respondent.

BARTLETT, J.— This is an action to recover damages for personal injuries. The plaintiff, at the time of his injury, October 31, 1890, was in the employ of James N. Willard, Jr., lumber dealer, in the city of Albany, who was the proprietor of a yard upon which stood a mill for the cutting and dressing of lumber, situated some distance from the railroad of the defendant. A switch had been constructed from the railroad premises to the lumber yard, entering at the north end, and extending its entire length, parallel with the mill. A low platform was erected between the track and the mill, on which lumber was loaded and unloaded. It is an admitted fact that this track was the property of Willard, and built upon his land. When cars were standing in the yard for the purpose of loading or unloading, they were uncoupled and moved by hand as required, and it was customary to keep standing upon this track a number of box cars for the convenience of the business. When Willard desired to move any of these cars away, he sent word to the defendant company, and a switch engine, with its crew of men, would come to the yard for that purpose. It was customary for the engine to stop at the entrance of the yard, and the crew would send notice to Willard, or, in his absence, to his foreman, that they were ready to do his work, and they would await orders. This course of procedure was pursued on the morning of the accident. Willard was duly notified, and, under his direction, the engine entered upon the track in the yard, for the purpose of coupling the cars and drawing them out. It appears that plaintiff and a fellow-workman were between two of the cars, engaged in moving one of them by hand, at the time the engine was backed down, and the cars were forced together. Plaintiff was caught between the bumpers, and severely injured. There was a conflict of evidence as to whether Willard, through his foreman, notified his various employees at work about and between the cars of the fact that the engine was about to back down. The plaintiff having been nonsuited, this disputed point must be deemed decided in his favor; and the single question is presented whether the defendant discharged its full duty in the premises, by notifying Willard, and proceeding with the work in the yard under his directions.

It was stated on the argument by the learned counsel for both parties that the precise question now presented has not been decided

by this court. It seems to us quite clear, upon principle, that the defendant cannot be held liable on the admitted facts of this case, after giving to the plaintiff the benefit of every presumption to which he is entitled under the record as it stands. It may be conceded at the outset that the engineer and crew on the defendant's engine, while operating in the yard of Willard, rested under the general duty imposed upon all men to abstain from injuring another intentionally or carelessly. There is no evidence that any of the engine crew knew that plaintiff was at work between the cars which were forced together. The engine had coupled on several cars, and stopped; then backed up further, for other unconnected cars, when the accident happened. The speed of the engine was a mile an hour or less, and the impact of the coupled cars upon the cars standing by themselves moved the latter from two to four feet. The plaintiff was working at a point where he was concealed from the engine crew, and at a time when they had every reason to assume, from the usual course of business in the yard, that all men working between and about the cars had been warned that they were about to be coupled and moved. It is, therefore, clear that the defendant did not violate any general duty imposed upon it which resulted in the injury of plaintiff.

We come, then, to the question whether the defendant owed to the plaintiff any active duty of vigilance, the failure to perform which was in law negligence. To render one liable for the negligence of another, the relation of master and servant, or principal and agent, must exist. *Stevens v. Armstrong*, 6 N. Y. 435; *King v. Railroad Co.*, 66 N. Y. 181. It is necessary to determine the precise relation of the parties, as a matter of law, under the admitted facts. The counsel for plaintiff insists that defendant was bound to use the same care and caution as it would be obliged to exercise upon its own track for the protection of persons properly engaged thereon, and that the question is whether the defendant discharged its whole duty towards plaintiff by giving notice to Willard, and failing to notify the men actually engaged upon the work. If the defendant was, in law, the master of not only the engine crew, but of all of Willard's employees during the moving of cars in the lumber yard at the time of the accident, then it undoubtedly rested under the obligation to notify the plaintiff that the cars were to be coupled and moved, and a notice to Willard alone would not be a discharge of its whole duty. It would be immaterial whether Willard was regarded as the servant or agent of the defendant for the purpose of giving notice to the plaintiff, as defendant would be liable for his failure to perform the duty imposed upon him. We are of opinion,

however, that the defendant did not sustain the relation of master to the plaintiff, or to any one engaged in moving the cars in the lumber yard during the time that work was in progress on the day of the accident. Willard was the master on that occasion, and the plaintiff was in his employ. The track belonged to Willard, and was built upon his property. The engine crew of the defendant came upon Willard's track at his request, to perform a service for him; and during the time they were thus engaged and acting under his orders, and subject to his control, they were, in law, his servants. It would, doubtless, have been a careless and negligent act for the engine crew, upon being sent for, to have entered the yard of the plaintiff, and begun the work of coupling and moving cars without notice to Willard or his representative; but they discharged their whole duty to plaintiff, and to all the regular employees in the lumber yard, when they notified Willard, on the day of the accident, of their readiness to proceed with his work, and thereupon entered the yard with the engine, and coupled and moved the cars, in obedience to his orders.

We do not express any opinion as to whether, between the plaintiff and Willard, the latter was negligent, or whether plaintiff was injured by the act of a fellow-servant. These questions are not before us, and nothing we have said is intended to bear upon them in any way.

The counsel for plaintiff insists that two rules of the defendant applied to the situation at the time of the accident, viz., rules 100 and 102; but, as the defendant rested under no responsibility as master, its rules cannot be invoked in aid of plaintiff's case. It is a hard situation for the plaintiff, who appears to have been very seriously injured, but the case was properly disposed of by the Supreme Court. The judgment appealed from should be affirmed, with costs. All concur, except ANDREWS, C. J., not sitting.

KIMMER v. WEBER ET AL.

Court of Appeals, New York, January, 1897.

FALL OF A SCAFFOLD—MASTER AND SERVANT.—Where plaintiff's intestate was one of a number of masons engaged on defendants' contract upon a building who used certain scaffolding other than that directed by defendants' foreman, and a fall of timber caused the scaffold to fall upon plaintiff's intestate whereby he was killed, defendant was not liable for damages nor for the foreman permitting work to be done upon the scaffold in question.

FROM a judgment of the Appellate Division, which affirmed judgment rendered for plaintiff in Supreme Court, General Term, First Department, New York, defendant appeals.

HAMILTON WALLIS, for appellants

E. B. BARNUM, for respondents.

The plaintiff's intestate was an apprentice in the employ of the defendants, who were builders, and was killed on February 16, 1891, by the falling of a scaffold used by the defendants' workmen in their business. The question was whether the accident was the result of negligence on the part of the defendants. The jury found that it was, and the inquiry is whether the proofs in the case sustain the finding. The defendants had a contract for the mason work of a brewery, which was in process of erection. There was also a gang of carpenters and a gang of plumbers at work upon the building, each under separate contracts with the owner. The plumbers engaged in fastening pipes upon the ceilings of the different floors made use of a scaffolding which had been constructed for them by one of the carpenters. It was first used in the cellar, then removed to the first floor and used for the same purpose, and then taken down and removed to the floor above. The ceiling of this floor being higher than the others, the plumbers found it necessary to raise the height of the scaffolding. They procured the same carpenter to make the change. This was done by extending the uprights by means of pieces of timber nailed to them and fastened by cleats. It seems, in that form, to have answered all the purposes of the plumbers. It consisted of three planks, supported on crosspieces fastened to the uprights, and was left by the plumbers in the room when they had completed their work. Neither the defendants nor any of their employees had anything whatever to do with the construction or use of the scaffolding. About two weeks before the accident the defendants sent a gang of masons to the building, of which the deceased was one, to point up the arches of the ceiling. The defendants' foreman gave the men instructions to make a scaffolding for themselves, with three horses furnished by defendants, by placing planks on two of them, and using the third to extend the scaffold as they passed around the room. The place furnished to the masons to do the work was, in a general sense, the room or second floor of the building, and it is not claimed that this place was in any sense unsafe. The erection of the scaffolding was a detail of the work which, it is apparent, devolved upon the workmen themselves, as they needed it to move around the room. It is not claimed that the defendant failed to provide proper material for the construction of such a scaffolding. The workmen, of whom the

deceased was one, constructed the scaffold according to their own judgment. They used this plumber's scaffold for one side of it, and placed a structure against the wall for the other side. From this structure to the plumber's scaffold crosspieces were placed, upon which planks rested to accommodate the workmen. The scaffolding thus constructed was used for about two weeks, and moved about the room as occasion required, all of which seems to have been done by the workmen themselves. The crosspieces, or some of them, seem to have been heavy pieces of timber, and on the day of the accident two of the workmen were engaged in putting one of these timbers in place. While so engaged, one of the men let fall the end of the heavy timber that he was holding, and it crushed by its sudden fall, and broke, one of the crosspieces of the plumber's scaffold. This caused the whole scaffold to fall, resulting in the injury and death of the plaintiff's intestate. The accident was evidently caused by the neglect of the workmen who were handling the timber, or by some defect in the crosspiece of the plumber's scaffold. If the accident is to be attributed to the act of the workmen who were engaged in putting the timber in place, there is nothing in the case to show that the defendants are liable for the misconduct. They were co-servants, and nothing appears to charge the defendants with negligence, either in employing them originally, or in retaining them.

There was some evidence to the effect that, when the masons were at work on this scaffolding, one of the plumbers called the attention of the defendants' foreman to the fact that the plumbers' scaffold, which was part of that used by the masons, was insufficient, and that the foreman replied that he thought it would do. This the foreman denies, and says that he was not aware that the plumbers' scaffold was in use till after the accident. But, assuming that his attention was so called to the matter, as testified to by this witness, was the foreman guilty of negligence, attributable to the master, in permitting the workmen to go on with the work upon the platform that they had erected to suit themselves? If his judgment was wrong with respect to the sufficiency of the platform, so was that of the workmen. They knew as much with respect to the safety of the place where they stood as he did. None of the masons suggested to any one that the scaffold was unsafe. Whatever was said on that subject was by one of the plumbers, when he saw the men using their scaffold. If, under these circumstances, the foreman had refused or declined to interfere with what had been done by the workmen, and he trusted to their judgment, it was not such negligence as to charge the defendants with the result of the accident. It was at most but an error of judgment on the part of the foreman

with respect to a detail of the work in which the masons were engaged.

Plaintiff failed to make out a case for the consideration of the jury for these reasons: 1. It was not shown that it was the duty of the master, under the circumstances, to construct the platform on which the masons were to do the work. 2. The proof shows that this duty was assumed by the workmen as one of the details of the work. 3. It was not shown that the defendants or their foreman actually constructed or directed the construction of the platform. 4. It was not shown that the plumbers' scaffold, which gave way, was any part of the material furnished by the defendants or the foreman, or that they contemplated the use of it for the purpose to which it was put. It did not belong to the defendants, but was in the building; and, if the workmen made use of it for the purpose, without any direction from the defendants, or any knowledge on their part, the result is not chargeable to the master. It appears to have been in use for ten days by the masons, who moved it about the room from place to place as the work required, and it gave way only when a large beam was allowed to fall upon it by one of the workmen. The proof, as it appears in the record, was not sufficient to warrant a finding of negligence against the defendants.

Judgment reversed. GRAY, J., dissented.

Opinion by O'BRIEN, J.

FIRST NATIONAL BANK OF PORTLAND v. LINN COUNTY NATIONAL BANK (1).

Supreme Court, Oregon, January, 1897.

DECLARATIONS OF BANK RECEIVER.—The declarations of the receiver of a national bank, in relation to the receipt by it of a draft prior to his appointment and not within his personal knowledge, are not admissible to charge the bank with negligence in respect thereof.

PRESENTMENT OF CHECK.—The holder's laches in presenting a check for payment does not discharge the drawer when he had no funds in the bank to meet it.

APPEAL from judgment of Circuit Court, Linn county, in favor of defendant.

1. Compare *Western Wheeled Scraper Co. v. Sadilek* (Neb.), reported in this volume, p. 113, *ante*.

J. N. TEAL, for appellant.

J. K. WEATHERFORD, for respondent.

The complaint alleged that on June 16, 1893, the plaintiff forwarded by mail to defendant, its regular agent at Albany, Oregon, for collection and payment, a sight draft for \$1,000, drawn by one J. L. Cowan on defendant in favor of Fleischner, Meyer & Co., and by them indorsed to plaintiff for deposit on account; that the draft was received by defendant on the day it was mailed, but it did not collect or pay the same and negligently failed to notify plaintiff of non-collection or non-payment, and no action was taken thereon until June 24, when defendant, having in the meantime closed its doors and passed into the hands of a national bank examiner, such examiner, at plaintiff's request, presented the draft for payment, which, being refused, the draft was duly protested; that notice of non-payment should have been given by defendant to plaintiff on June 17, when said Cowan was, and until the 19th, solvent, but on the last named date he became and ever since has been insolvent. The defendant denies the negligence and alleged that the draft was not received until June 24, and was then protested for non-payment, and plaintiff notified. The only question of fact in issue was the date of the receipt of the draft by the defendant, and in support thereof the plaintiff offered a letter written by the receiver of the defendant to the plaintiff's attorneys, in which it was stated that the draft in question was taken out of the post office at Albany "by Examiner Jennings, on his arrival June 21st, and not received by the bank before suspension." The court refused to admit the letter in evidence, and error is assigned. Without deciding — but conceding — that the receiver was the statutory agent of the defendant as claimed by plaintiff, the letter was clearly incompetent. It is, at most, but the narrative of a past event and does not appear to have been made by the receiver as a part of some transaction then pending within the scope of his authority. When declarations do not accompany the act, or are concerning a matter not within the scope of the agent's authority, the principal cannot be affected by them in any way. 1 Greenl. Ev. sec. 113; Mechem, Ag. 115; *Anderson v. Railroad Co.*, 54 N. Y. 334; *La Rue v. Elevator*, 54 N. W. 806. It was also claimed that the court erred in charging the jury that negligence of the defendant bank in not making due presentment of the draft would not discharge the drawer from liability if he had no funds in the bank applicable to its payment. There being no evidence to the contrary, it will be assumed the draft in question was an ordinary bank check. The holder's laches in presenting a check for payment constitutes no defense in an action against the drawer,

unless he is damaged by the delay, and then only to the extent of his loss. If he had no funds or subsequently withdraws them, he commits a fraud and can suffer no loss from delay in presenting the check.

Judgment affirmed.

Opinion by BEAN, J.

FRANCIS ET UX. V. TOWNSHIP OF FRANKLIN.

Supreme Court, Pennsylvania, January, 1897.

LIABILITY OF COUNTY, AND NOT TOWNSHIP, FOR KEEPING BRIDGE IN REPAIR.—A person, injured by the horse she was driving jumping over a wall of a bridge cannot recover against a township for not providing guard-rails where, by statute, the bridge is under the control of the county.

APPEAL by defendant from judgment rendered for plaintiff in Court of Common Pleas, Butler county.

MCJUNKIN & GALBREATH and THOMPSON & SON, for appellant.

RALSTON & GREER, for appellees.

The plaintiff, Mary Francis, with three members of her family, on February 27, 1895, in a one-horse sled, was driving on the highway to cross a county bridge, in defendant township, when the horse became uncontrollable, ran away, jumped over one of the wing walls of the bridge to the ice below, dragging the sled and occupants after him, whereby plaintiff was very seriously injured. She alleged negligence on part of the township in not erecting guard-rails. There was evidence that the horse was blind and unmanageable generally, and was on that day negligently harnessed and driven. Two questions, therefore, were submitted to the jury: 1. Was defendant negligent in not putting up guard-rails? 2. Should contributory negligence be imputed to plaintiff? Both questions were answered in favor of plaintiff by the jury, who found a verdict for her of \$2,300 damages. A third question, one of law, solely for the court, was raised, and decided against the defendant. It was this: In view of the fact that the bridge was a county bridge, was the township answerable for the character of the structure, or for neglect to keep it in repair? The defendant contended that under the statute of April 13, 1843, sec. 1, the county assumed the charge of the bridge, which bridge was subsequently entered of record as a county bridge. On appeal it was held that it was the duty of the county to

build the bridge of which the wing walls were a part, and keep both in repair, and the judgment of the court below in favor of plaintiff was reversed.

Opinion by DEAN, J.

LENKNER v. CITIZENS' TRACTION COMPANY.

Supreme Court, Pennsylvania, January, 1897.

INJURED IN COLLISION WITH STREET CAR — NEGLIGENCE FOR JURY.— Where plaintiff was injured while driving, by coming into collision with a street car, the question of negligence on the part of plaintiff and defendant were for the jury to determine from the evidence.

APPEAL by defendant from judgment rendered for plaintiff in Court of Common Pleas, Allegheny county.

GEORGE C. WILSON and WILLIAM D. EVANS, for appellant.

W. K. JENNINGS and H. G. WASSON, for appellee.

On the morning of March 3, 1894, the plaintiff, then about nineteen years of age, was riding in an open, one-horse spring wagon on Penn avenue, Pittsburg, in company with an older sister, who was then driving. As they were approaching Fourteenth street, on defendant company's west-bound track, they were warned by the bell on one of the defendant's west-bound cars, following on same track behind them, to turn out. Plaintiff testified, in substance: That they could not go forward on the track, because of an open man-hole immediately in front of them, nor could they turn off to the right, because that side of the avenue was blocked with wagons, and they were therefore compelled to turn out to the left, across defendant's east-bound track. As they turned off the west-bound track, on which they had been driving, they saw an east-bound car of the company approaching them at a point west of Fourteenth street. That witness was looking towards the approaching car, and the motorman in charge thereof did not ring his bell or apply the brake, or give her sister, who was driving, any time to cross the track, and the car struck the wagon, threw her to the ground, rendering her unconscious, and causing the injuries complained of. In the main, she was corroborated by the testimony of her sister, and also by another witness, who testified minutely to what occurred at the time of the collision. There was some conflicting testimony, the case being clearly for the jury. The question for the jury was not whether the motorman stopped his car at the time of the

accident, but whether he was negligent in not stopping it before the collision with plaintiff's wagon occurred. The case was properly submitted to the jury, and judgment for plaintiff would not be disturbed.

Opinion by STERRETT, Ch. J.

YOUNG v. OMNIBUS COMPANY GENERAL.

Supreme Court, Pennsylvania, January, 1897.

BOY SKATING ON STREET INJURED IN COLLISION — NONSUIT.—

Where a boy while skating on the street suddenly dashed across the street and collided with an omnibus, a nonsuit was proper, as the occurrence was an accident, free from negligence.

APPEAL from judgment rendered for defendant in Court of Common Pleas, Philadelphia county.

W. HORACE HEPBURN, for appellant.

JAMES WILSON BAYARD and FRANK P. PRICHARD, for appellee.

Plaintiff, a boy eleven years old, while skating with roller skates on the street, slipped, made a dash forward and came into collision with an omnibus belonging to defendant, the driver of which was not watching the street in front of him. *Held*, that a nonsuit was proper, as the occurrence was accidental, rather than due to negligence on either plaintiff's or defendant's part.

Judgment affirmed.

Opinion PER CURIAM.

CLEARY v. PITTSBURGH, ALLEGANY AND MANCHESTER TRACTION COMPANY.

Supreme Court, Pennsylvania, January, 1897.

INJURED AT STREET CROSSING — NEGLIGENCE FOR JURY.—

Where a person about to cross a street, and a street car stopped just before reaching the street, each apparently expecting the other to wait, and then both started so nearly together that a collision became unavoidable, it was for the jury to determine the question of negligence.

APPEAL by defendant from judgment rendered for plaintiff in Court of Common Pleas, Allegheny county. The facts are stated in the opinion.

A. M. NEEPER, for appellant.

MARSHALL & SPROUL and MARRON & MCGIRR, for appellee.

MITCHELL, J.—It is charitable to suppose that the plaintiff's recollection was so confused after the accident as to make her testimony worthless, for she testifies that she looked around in the direction of the bridge, and there was no car there, whereas the uniform and undisputable testimony of every one else who saw the accident, including her own witness O'Harra, was that the car which struck her was within fifteen to twenty feet of her at that moment. This would, therefore, be a clear case of contributory negligence by stepping in front of a moving car, within the rule in *Carroll v. Railroad Co.*, 12 Weekly N. C. 348, were it not for the fact that appears clearly, even in the defendant's evidence, that the car had also stopped. We have, therefore, the case of a foot-passenger about to cross a street, a car stopped just before reaching the crossing, each apparently expecting the other to wait, and then both starting so nearly together that a collision became unavoidable. Under such circumstances, only a jury could say where the fault lay. The recital of the testimony by the judge in his charge did not follow the language of the witnesses exactly; indeed, it would have been very difficult to repeat much of it precisely; but we have not been convinced that he made any substantial misstatement of the substance of it.

Judgment affirmed.

STRINGERT V. TOWNSHIP OF ROSS.

Supreme Court, Pennsylvania, January, 1897.

PERSON KILLED WHILE DRIVING ON HIGHWAY — EVIDENCE — LIABILITY OF TOWNSHIP.—Where a person was found on the public highway, with a broken neck, near a one-horse wagon which he had been driving, and there were no witnesses to the accident, an action cannot be maintained against a township for alleged negligence in keeping the road in proper repair, without proving that such negligence was the producing cause of the person's death.

APPEAL by plaintiff from judgment rendered for defendant in Court of Common Pleas, Allegheny county.

JAMES FITZSIMMONS, for appellant.

GEORGE H. QUAILL, for appellee.

In the afternoon of November 8, 1890, the dead body of the plaintiff's husband was found lying in one of the public roads of the

defendant township leading to the City of Allegheny. The body was discovered at about four o'clock p. m. The day was dry and pleasant. The deceased was riding in a one-horse wagon, which had been loaded with willow baskets, when he left home in the morning, and which were intended to be, and no doubt were, disposed of in the city. When found in the afternoon, there was nothing in the wagon but two sacks of feed and two kegs of beer. Upon examination of the dead body it was discovered that the neck was broken at a point which probably caused instant death, according to the testimony of the attending physician. No person saw the accident, and no witness was examined who gave any testimony whatever as to the facts of the occurrence. This action was brought by the widow to recover damages from the township for the loss of her husband. At the trial, upon the completion of the plaintiff's testimony, the court granted a compulsory nonsuit, upon the ground that there was not sufficient evidence to hold the township liable. Plaintiff appealed. Of course, it was necessary for the plaintiff, in order to establish a cause of action, to show not only the death of her husband, but also that his death was occasioned by the negligence of the defendant. *Railroad Co. v. Latshaw*, 93 Pa. St. 449; *Baker v. Fehr*, 97 Pa. St. 70; *Borough of Easton v. Neff*, 102 Pa. St. 474. As there was no testimony to the facts which resulted in his death, there is a serious practical difficulty in the way of the plaintiff in establishing her cause of action. There was evidence given as to the condition of the road at the place of the accident, and it was of such a character that a jury might be justified in finding that it was in a condition of bad repair, which was due to the negligence of the defendant. But, in order to recover, it must be further shown that the negligence of the defendant in this regard was the producing cause of death. If, taking all the facts together, a justifiable inference could be drawn that the negligent condition of the road was the cause of death, there was enough to carry the case to the jury. But the difficulty in the case is that the plaintiff's contention in this regard requires a succession of inferences without any actual testimony to support them. The plaintiff's husband was killed by a fall from a wagon, but there was no proof as to what produced the fall. The conjecture of a cause is not sufficient, especially when other causes for which the defendant would not be responsible might just as well have produced the fall.

Judgment affirmed.

Opinion by GREEN, J.

ROBERTSON V. PENNSYLVANIA RAILROAD COMPANY.

Supreme Court, Pennsylvania, January, 1897.

BICYCLE RIDER KILLED BY TRAIN — FAILURE TO LOOK AND LISTEN.— Where a bicycle rider came to a railroad crossing, and a freight train passing at the time, he circled around until the train had passed, and then, without dismounting, he started across the track without looking or listening and was struck by a train and killed, an action to recover damages for his death cannot be maintained.

APPEAL by plaintiff from judgment of nonsuit in Court of Common Pleas, Philadelphia county. The facts appear in the opinion.

HENRY BUDD and B. F. GILKESON, for appellant.

D. W. SELLERS, for appellee.

MITCHELL, J.—The facts in regard to the decedent's negligence are not disputed. He was riding a bicycle, and when he came to defendant's road, which at that point had four tracks, a freight train was passing, for which he had to wait. He did not dismount, but made what the appellant calls a "bicycler's stop," by circling on his wheel round and round, at a distance of five to ten yards from the track; and, when the freight train had passed, he started across, without dismounting, and was struck by a train coming in the opposite direction, on another track. Passing by the questions raised as to ability to see the coming train from other points, it is admitted that, before reaching a position of actual danger, there was a space of not less than seven feet between the tool house and the nearest track, from which an unobstructed view of the train could have been had. It was the duty of the deceased to stop there, and to dismount, in order to make his stop effective for the purpose of looking and listening. The real contention of the appellant is embodied in the proposition that the circling round and round constituted a legal as well as a bicycler's stop. No such proposition can be entertained for a moment. In so circling, the rider must, to some extent, have his attention fixed on his wheel, and, at parts of the circle, must have his back to the track which he is professing to watch. The law requires a full stop, not only for the sake of time and opportunity for observation, but to secure undivided attention, and the substantial and not merely perfunctory performance of the duty to look and listen. Riding round and round in large or small circles, waiting for a chance to shoot across, is not a stop at all, either in form or substance.

Considering the ease of dismounting, and the control of the rider over his instrument, a bicycler must, under all ordinary circumstances, be treated as subject to the same rules as a pedestrian. We do not say that there may not be cases of accident by broken gearing, or steep grade, or other casualty which will require a modification of the application of such rules; but these cases will be exceptional, and must be decided on their own facts when they arise. The general rule to be applied requires that a bicycler must dismount, or, at least, bring his wheel to such a stop as will enable him to look up and down the track, and listen, in the manner required of a pedestrian. It is plain that the deceased, in the present case, did not do this, and that his failure to do it was an efficient element of the unfortunate accident by which he lost his life.

Judgment affirmed.

AUBERLE v. CITY OF McKEESPORT.

Supreme Court, Pennsylvania, January, 1897.

DESCRIPTION OF BRIDGE—OPINIONS OF WITNESSES INADMISSIBLE.—Where a person was injured by falling off a bridge, the admission of opinions of witnesses that the bridge at the place where the accident occurred was dangerous, when the jury had a full description of the bridge, was error.

Following the rule in *Graham v. Penn. Co.*, 139 Pa. St. 149 (1).

FALLING OFF BRIDGE—CONTRIBUTORY NEGLIGENCE.—Where plaintiff was injured by falling off a bridge, which bridge was the full width of the road, thirty-three feet, seventeen feet in length and five feet above the bottom of the run, but there was no hand-rail or guard on the outside, and, from the evidence, it was proved that plaintiff was familiar with the location of the road and the bridge, and although it was a moonless night when the accident occurred, yet plaintiff could see a man at a distance of more than 200 feet, the verdict of the jury for plaintiff could not stand, as it was impossible for a person, using reasonable care, under the circumstances, to have fallen off the bridge.

1. The court stated the rule in *Graham v. Penn. Co.*, 139 Pa. St. 149, 6 Am. Neg. Cas. 329, 21 Atl. 151, to be, that, where mere descriptive language is inadequate to convey to the jury the precise facts or their bearing on the issue, the description by the witness must, of necessity, be allowed to be supplemented by his opinion, in order

to put the jury in position to make the final decision of the fact. But where the circumstances can be fully and adequately described to the jury, and are such that their bearing on the issue can be estimated by all men, without special knowledge or training, opinions of witnesses, expert or other, are not admissible.

APPEAL by defendant from judgment for plaintiff rendered in Court of Common Pleas, Allegheny county.

W. B. RODGERS and T. C. JONES, for appellant.

F. H. GUFFEY and J. M. STONER, for appellee.

Action by Pauline Auberle against defendant for personal injuries caused by alleged negligence of defendant whereby she fell off a bridge. The bridge in question was not in the built-up portion of the borough, but in a rural district, close to the township line. It was the full width of the road, thirty-three feet, seventeen feet in length by the city surveyor's measurement, and five feet above the bottom of the run. The only complaint made of it was the absence of a hand-rail or guard on the outside. As said by the learned judge below, it is difficult to see how any sober person, exercising reasonable care, would be likely to walk off such a bridge. Under such circumstances there was not sufficient evidence of negligence on the part of the borough to submit to the jury. It is a much weaker case than *Monongahela City v. Fischer*, 111 Pa. St. 9, 2 Atl. Rep. 87. The plaintiff was clearly guilty of contributory negligence. About nine o'clock at night, she started out without a lantern, to hunt her cow, which had broken loose and got away. She proceeded over rough roads, and through an unfenced alley, across farm lands; found her cow; and, in driving it home, came to this bridge. She testified that she was not acquainted with it since the rebuilding, some months or a year before — a statement, as the learned judge says, not only inherently improbable, but negatived by the positive testimony of other witnesses who had seen her cross it. But, assuming it to be true, she had lived since 1861 within 800 feet of the place, and the testimony is undisputed that the two previous bridges at that point had been only about half the width of the roadway. She had therefore a long acquaintance with the locality when it was less safe than at the time of this occurrence. It was a moonless night, but could not have been very dark, as she was able to follow and find her cow, and no witness on either side indicates any difficulty in seeing a reasonable distance. There were electric lights belonging to the passenger railway in the neighborhood, but the exact position and effect of them were disputed. Coming to the moment of the accident, the plaintiff, who was the only witness, testified that she saw a big man coming, and the cow, then about 100 feet ahead, "walk sideways. I noticed a cow with her bell walking sideways to the left, and so I thought, 'Oh, well, I am not going to walk on top of this man,' and I walked sideways too; and, the first thing I knowed, my foot had no hold, and I fell." And on cross-examination she said that she stepped aside to avoid "walking

on top of the man," while he was still between two and three hundred feet away. Thus, with light enough to see a man at that distance, and to notice the action of the cow in turning aside, she, that far in advance of meeting the man, and without looking where she was going, stepped clear out of the roadway of thirty-three feet, and over the side of the bridge. It is impossible to permit a jury to say that that was exercising reasonable care.

Judgment reversed.

Opinion by MITCHELL, J.

SPROWLS v. TOWNSHIP OF MORRIS.

Supreme Court, Pennsylvania, January, 1897.

FAILURE TO FENCE ROAD — HIGHWAY.— In an action for injuries sustained by reason of defendant's negligence in failing to erect a barrier between a public road and a parallel railroad track, the question whether plaintiff was guilty of contributory negligence in not jumping from his buggy when he saw an approaching train, the time to decide what to do in the emergency being very short, was for the jury to determine from all the facts.

APPEAL by defendant from judgment for plaintiff rendered in Court of Common Pleas, Washington county.

R. W. IRWIN and MCCrackens & McGIFFIN, for appellant.

ALBERT S. SPROWLS and J. M. SPROWLS, for appellee.

Plaintiff brought action against the defendant township for injuries sustained by him while driving due to alleged negligence of the township in failing to erect a barrier between its highway and a parallel railway track. It appeared that the road upon which plaintiff was driving was very narrow, only about ten feet in width. At the time of the accident the train was approaching at the rate of fifteen miles an hour, and when first seen by plaintiff it was distant about 680 feet, which, at the rate of speed it was going, would reach plaintiff in about thirty-five seconds. In that short time plaintiff had to consider what was best for him to do. On one side of the road was a steep, inaccessible bank, and on the other a steep declivity, down a bank fourteen feet on its slope and ten to twelve feet in perpendicular depth. At the foot of the bank was a surken space or gutter two and one-half feet in width, and then the bed of the railroad track, the nearest rail being about four feet from the foot of the bank. The road inclined upwards towards the brow or

knoll, a short distance beyond which plaintiff said he could not see the road. The time was short to determine what was best to do in the emergency. It was dangerous to jump from the buggy and plaintiff thought the best thing to do was to keep his horse in motion and try to gain a better position. The question as to whether plaintiff was guilty of contributory negligence in not immediately jumping from his buggy when he perceived the danger, was entirely for the jury to decide upon the facts and having found for plaintiff judgment was affirmed.

Opinion by GREEN, J.

NEMIER V. RITER ET AL.

Supreme Court, Pennsylvania, January, 1897.

INJURED BY NEGLIGENCE OF FELLOW-SERVANT.—Where plaintiff, an employee of defendant, was injured by reason of the negligence of a fellow-servant, he cannot recover from the defendant.

APPEAL from Court of Common Pleas, Allegheny county.

L. K. & S. G. PORTER, for appellants.

STONE & POTTER, for appellee.

Plaintiff, an employee of defendants, was injured by one of the planks or joists in the floor of the place where he was working becoming displaced. The displacement was due to the negligence of the carpenter in the employ of the defendants in properly fixing the planks. There was no defect in the planks. The evidence did not show any negligence on defendant's part, but the accident was due to the negligent act of plaintiff's fellow-servant.

Opinion by FELL, J.

PLATZ V. TOWNSHIP OF MCKEAN.

Supreme Court, Pennsylvania, January, 1897.

ALLEGATION AND PROOF — DISCREPANCY.—Where, in an action for personal injuries sustained by reason of a defective culvert on a road, there was a discrepancy in the allegation and the proof as to where the accident occurred, and the defendant was not prejudiced thereby, such discrepancy was not sufficient to give verdict for defendant, and request to do so was properly refused.

WEIGHT OF EVIDENCE — INSTRUCTION.—An instruction that the evidence of a disinterested witness is entitled to more weight than that of an interested witness was properly refused.

NOTICE.—Notice given to the supervisor is notice to the township (1).

SUPPLEMENTARY EVIDENCE.—In such action it was *held* not error to reject an offer to supplement description of the condition of the defective sluice by the opinions of witnesses as to its safety (2).

APPEAL by defendant from judgment for plaintiff rendered in Court of Common Pleas, Erie county.

CLARK OLDS, T. A. LAMB, and E. A. WALLING, for appellant.

ORA L. FLINN and J. ROSS THOMPSON, for appellee.

Plaintiff's wife jumped or was thrown from a buggy and injured while driving upon the old Edinboro plank-road, in McKean township, about half a mile south of Middleboro. The court instructed the jury that, if she jumped from the buggy, the plaintiff could not recover. In the narr. on which the case was tried, the road was described as "a public or township road commonly called the 'Old Edinboro Plank-road,' leading from Erie to Middleboro." At the close of plaintiff's evidence in chief, defendant moved for a nonsuit, on the ground that the *allegata* and *probata* did not agree. The nonsuit was refused, and at the close of the evidence in the case defendant submitted a point to the effect that, as there was no evidence that the injury was received between Erie and Middleboro, "the verdict must be for the defendant." The point was also refused. Counsel for defendant frankly conceded that they were not misled by the narrative and it was not seen, therefore, how defendant was prejudiced by the alleged discrepancy between it and the proofs. The court did not agree with the defendant that the dishing condition of the sluice had no connection with the accident. As described by the plaintiff's witnesses, it may have been a contributing, if not the primary and sole, cause of it. It was a matter of very slight, if of any, importance, whether the horse broke through the plank because of a defect in it, or because of the dishing of the sluice. The result was the same in either case.

There was no error in the refusal to affirm defendant's points as to weight of evidence. The fact that a witness has an interest in the case may and should be considered by the jury in determining what weight shall be given to his testimony, but we know of no legal warrant for an instruction from the court that the testimony of a

1. Citing *Burrell Tp. v. Uncapher*, 117 Pa. St. 353, 11 Atl. Rep. 619; *Dundas v. City of Lansing*, 75 Mich. 499, 42 N. W. Rep. 1011.

2. Sustained on the authority of *Graham v. Penn. Co.*, 139 Pa. St. 149, 6 Am. Neg. Cas., 21 Atl. Rep. 151.

disinterested witness is entitled to "more weight" than his. If Mrs. Platz had, in her former testimony or elsewhere, made statements contradictory of her testimony on the second trial, such statements affected her credibility as a witness, but they did not authorize an instruction that "the verdict must be for the defendant." A previous statement, that she did not know how she was injured, may have referred to the degree or extent of her injury, and was by no means a complete defense to the plaintiff's suit.

As the court instructed the jury that, if Mrs. Platz jumped from the buggy, the plaintiff could not recover, and as there was no other basis for even a suggestion of contributory negligence, the defendant has no cause to complain of the instructions in this particular. A careful consideration of the general charge in connection with the answers to the points submitted by the parties does not show that the instructions were inadequate, partial or misleading.

Judgment affirmed.

Opinion by MCCOLLUM, J.

RATHGEBE v. PENNSYLVANIA RAILROAD COMPANY.

Supreme Court, Pennsylvania, January, 1897.

INJURED ON STATION PLATFORM — NEGLIGENCE FOR JURY.—Where there was a conflict of testimony as to whether plaintiff was injured while passing over the slope of a station platform, or on the platform which was between two tracks, snow and ice having accumulated thereon, the question of negligence was for the jury to determine from the evidence.

WITHDRAWAL OF TESTIMONY.—The admission of incompetent evidence and its subsequent withdrawal before argument, furnishes in itself no ground for continuance, or for reversing the judgment, and where the jury were properly instructed with regard to it, prejudice cannot be presumed from its admission.

APPEAL from Court of Common Pleas, Westmoreland county. From judgment rendered for plaintiff, defendant appeals.

GAITHER & WOODS, for appellant.

ROBBINS & KUNKLE, for appellee.

Action was brought to recover damages for personal injuries alleged to have been received by the plaintiff on January 19, 1893, through the negligence of defendant. It was conceded on the trial that plaintiff fell and was injured while walking from the waiting-room to the train, but there was a conflict in the evidence as to the place where she fell. The plaintiff claimed that she fell on the

slope, while the defendant claimed that she fell on the platform between the side track and the Sewickley track. The defendant's claim involves an admission that the plaintiff's fall was caused by the ice on the platform between these tracks, but it did not necessarily convict the defendant of negligence, because it was shown and undisputed that this ice must have been formed from the water which leaked or was splashed upon it from the water cars which passed on the Sewickley track but a few minutes before her fall. The evidence submitted by the defendant was mainly directed to this line of defense, and the learned judge of the court below substantially charged the jury that, if it was credited by them, plaintiff could not recover. Plaintiff claimed that defendant was chargeable with negligence in the construction of the station platform, and in permitting an accumulation of snow and ice upon it. The length of this platform from the west end of the station to the freight platform, and in front of the ticket office and waiting-room was about fifty feet. Along the whole length of it, facing the track, it was ten or twelve inches higher than the track platform. For at least three-fifths of the length of the station platform there was a slope from it to the platform below. The width of the slope was about three feet, and at each end of it there was nine or ten feet of platform, terminating in a ten or twelve-inch step. Passengers in going from the waiting-room to the trains, would have to pass over this step or over the slope. They were not limited, by any order or direction of defendant, to either route, but were at liberty to pass over any part of the platform on their way to and from trains. The evidence showing the construction of the station platform was sufficient to charge the defendant with negligence in this particular, and the evidence in regard to snow and ice upon it warranted an inference that defendant had negligently permitted them to accumulate there. The question whether plaintiff was negligent in passing over the slope on her way to the train was, under all the evidence in the case, for the jury. Certain testimony was, on the request of defendant's counsel and before argument, stricken out and withdrawn from the consideration of the jury. Defendant contended that the court erred in denying motion to withdraw and continue the cause. The admission of incompetent evidence, and the subsequent withdrawal of it before argument, furnishes in itself no ground for continuance, or for reversing the judgment(i). There was no good reason for

1. Citing *McGettigan v. Potts*, 149 Pa. St. 155, 24 Atl. Rep. 198; *Canal Co. v. Barnes*, 31 Pa. St. 193; *Railroad Co. v. Butler*, 57 Pa. St. 335; *Railroad Co. v. Smith*, 125 Pa. St. 259, 17 Atl. Rep. 443; *School Furniture Co. v. Warsaw Tp. School District*, 158 Pa. St. 35, 27 Atl. Rep. 856.

apprehending or believing that defendant would be or was prejudiced by the testimony which was withdrawn before argument, and in regard to which the jury received positive and proper instructions from the judge.

Judgment affirmed.

Opinion by McCOLLUM, J.

DILLON V. ALLEGHENY COUNTY LIGHT COMPANY.

Supreme Court, Pennsylvania, January, 1897.

POLICEMAN ATTEMPTING TO REMOVE BROKEN LIVE ELECTRIC WIRE NOT NEGLIGENT.—It is not negligence on the part of a police officer who, while on duty, seeing a broken electric wire in such a position in the street as to endanger the lives of passers-by, attempts to remove it with his mace, although he may have known the wire was a live one, and in so doing receives an electric shock causing his death.

APPEAL by defendant from judgment rendered for plaintiff in Court of Common Pleas, Allegheny county.

GEO. C. WILSON and WM. D. EVANS, for appellant.

MARRON & MCGIRR, for appellee.

In the opinion of the trial court, in overruling motion for new trial, the facts were stated as follows:

“The jury have found, upon sufficient evidence, that the defendants permitted a dead and useless wire to remain upon their poles, on a street crowded with charged wires, many of them having such current passing them that the slightest touch meant death. They knew, as their own witnesses testify, that any wire upon those poles was liable to break and carry the deadly current to the ground by falling across a live wire, especially if the wire was a naked one, as this wire admittedly was. This dead, useless, and uninsulated wire did break, fell across a charged wire, carried down the current, and the death of the plaintiff's husband was the result. We certainly cannot disturb the verdict because of the finding of the jury on the question of the defendant's negligence. The only question which we are called upon to consider is that of the alleged contributory negligence of the man who was killed. He knew that the wire was conducting a dangerous current of electricity. If he had no duty imposed upon him with respect to it, he had sufficient notice to make it negligence for him to interfere with it. He was, however, a policeman, on duty at the time, and upon the street on which the wire fell. It hung from a pole, the end resting on the ground near

the foot crossing, and at intervals emitting sparks. It was a rainy night, and any contact with the wire meant injury. Even the touch of the frame of an umbrella of one passing to the wire would doubtless have caused the instant death of him who carried it. Will the law say to the policeman on duty under such circumstances that his sole or primary duty is to look out for his own safety? If it will not, then this question was one for the jury. It was told that, if he voluntarily took the wire in his hand, there could be no recovery. The testimony showed that he undertook to remove it with his mace,—a method which, under ordinary circumstances, would have been perfectly safe. In some unexplained way, he came into more dangerous contact with the wire. Test the case by changing the position of the parties. Suppose, in pushing aside this wire with his mace, Dillon had brought it in contact with, and thus injured, some one who was passing by, and had been sued; would any court have the hardihood to say, under the circumstances, as matter of law, that he was guilty of negligence? Doubtless, by standing on the sewer trap, especially on this wet night, he increased his danger. But a negligent company cannot, for the purpose of escaping liability for its acts, set up a duty on the part of policemen to be expert electricians; and we must, in discussing this question, assume the negligence of defendant company. Look at the matter as we will, we must either say to all policemen that in such cases they must put their own safety before that of the citizens whom it is their business to protect, or submit the question of negligence as one of fact to be determined by the jury. If there was error committed in the charge in this case, it was in favor of defendant. We are by no means certain that the maintaining on a street like this of naked wires, which might be insulated, is not negligence, or at least evidence of negligence. Even if a wire has no current of its own, it will, when broken, if uninsulated, much more readily lead off a dangerous current from another wire. Where the necessary dangers are so great, the unnecessary ones should all be eliminated."

On appeal the court said that the questions of fact were such that the jury alone could determine, and that the action of the trial judge in refusing to take the case from the jury, and in submitting to them the controlling questions of fact, namely, defendant's negligence and the alleged contributory negligence of the deceased, was proper. Defendants were negligent in leaving the broken telephone wire in a dangerous position in the street, and the deceased was not negligent in attempting to remove it.

Judgment affirmed.

Opinion PER CURIAM.

COOKSON V. PITTSBURGH AND WESTERN RAILWAY COMPANY.

Supreme Court, Pennsylvania, January, 1897.

KILLED WHILE CROSSING RAILROAD TRACK — NEGLIGENCE FOR JURY.— Where a person, while driving, stops at a point about 175 feet from a railroad crossing, and waits a few minutes while a train is passing, and then proceeds to cross the track, but is struck and killed by the train running backward to the crossing, the question whether the deceased exercised due care was properly left to the jury.

APPEAL by defendant from judgment for plaintiff rendered in the Court of Common Pleas, Butler county.

R. P. SCOTT, for appellant.

LEV. MCQUISTION and J. C. VANDERLIN, for appellee.

Action by Alfred T. Cookson against the defendant company for damages for death of plaintiff's wife, due to alleged negligence of defendant in running a train at a railroad crossing. The appellant's train was run northward, and, after detaching three cars onto a siding by a flying switch, was continued over and beyond the public road and then backed over the crossing again, with no brakeman at the rear, and no warning except the ringing of the bell at the other end, even this being disputed. Under such circumstances the appellant's negligence, though not formally conceded, did not admit of serious contention. The public road had a down grade towards the track, and plaintiff's decedent stopped at a point about 175 feet from the crossing. Here she waited some minutes, until three cars were switched off, and the train had proceeded north over the crossing. She then drove on, and was struck by the train as it reached the crossing the second time, running backward.

The main argument of appellant is that the evidence shows incontrovertibly that the deceased was negligent in not stopping at the second point already referred to, a level space just before reaching the track, and therefore the verdict should have been directed for the defendant. The evidence is uniform that there were but two places where a stop could be profitably made, one at considerable distance, and the other very close to the crossing (1). Each had

1. There were assignments of error to the admission of opinions of witnesses that the place where deceased stopped was a proper place. The court ruled the admissibility of such opinions on the authority of *Graham v. Penn.*

its advantages and disadvantages. The deceased chose the remoter point, and there was evidence that in so doing she followed the usual habit of people at that crossing. This evidence of itself prevented the court from deciding it to be negligent *per se*. The usual and customary place of stopping by people using a road cannot be said, as matter of law, to be an improper or negligent place. The standard of negligence is what persons of ordinary prudence and carefulness would do under the same circumstances, and a general habit of the public to stop in a certain place is persuasive evidence that that place is the right one. The further the stopping place is from the track, the greater will be the chance of an intervening peril before actual crossing. The duty of the traveler is, therefore, not only to keep a vigilant and continuous lookout but to stop if a second place affords any increased facility to discover impending danger; but whether there is any such second place is a question of fact, which is for the jury, if at all in doubt (2).

Judgment affirmed.

Opinion by MITCHELL, J.

Co., 139 Pa. St. 149, 6 Am. Neg. Cas., 21 Atl. Rep. 151, where the rule was settled that where mere descriptive language is inadequate to convey to the jury the precise facts, or their bearing on the issue, the description by the witness must of necessity be allowed to be supplemented by his opinion, in order to put the jury in position to make the final decision of the fact. But, whenever the circumstances can be fully and adequately described to the jury, and are such that their bearing on the issue can be estimated by all men without special knowledge or training, opinions of witnesses, expert or other, are not admissible. This rule was followed in *McNerney v. Reading City*, 150 Pa. St. 611, 25 Atl. Rep. 57, and *Dooner v. Canal Co* 164 Pa. St. 17, 30 Atl. Rep. 269.

2. On this point the court said that the case was closely analogous and governed by *Whitman v. Railroad Co.*, 156 Pa. St. 175, 27 Atl. Rep. 290, where it was said that, "if, notwithstanding the drawbacks of the place where plaintiff stopped, it still had sufficient advantages over other places to make it the habitual choice of travelers on that road, only a jury can say whether or not it was the best or a proper place to stop, and, even if it was, whether, considering its disadvantages, it was negligence in the plaintiff not to stop a second time on the level before reaching the track." See, also, *Ely v. Railway Co.*, 158 Pa. St. 233, 27 Atl. Rep. 970.

**GOORIN v. ALLEGHENY TRACTION COMPANY,
ET AL.**

Supreme Court, Pennsylvania, January, 1897.

PASSENGER INJURED IN COLLISION — LIABILITY OF RAILWAY COMPANIES CONCERNED.—Where a passenger's arm was broken in a collision between cars of two street railway companies, which were approaching a crossing from different directions, there being no rule as to the right of way, the question as to the liability of the companies for damages was for the jury to determine.

APPEAL from Court of Common Pleas, Allegheny county. Action by plaintiff against the Allegheny Traction Company and the Pittsburgh & Birmingham Traction Company for injuries sustained in a collision between street cars belonging to the two companies. At the trial plaintiff obtained judgment against both companies from which the Allegheny Traction Company appeals. Plaintiff was a passenger in a car of the Allegheny Traction Company on the night of September 8, 1893, when a collision occurred by reason of a car of each company, due to each approaching a crossing from different directions, there being, apparently, no rule as to right of way on such occasions. Each company claimed to be free from fault and asked to have the case taken from the jury, but the court ruled that the question as to the liability of either or both companies was for the jury to determine.

A. M. NEEPER and A. W. DUFF, for appellant.

JOSEPH STADTFELD, for appellee.

STERRETT, Ch. J.—This action of trespass, by a passenger on an Allegheny Traction Company's car, was brought against that company and the Pittsburgh & Birmingham Traction Company to recover damages for personal injuries resulting from the collision of the car of one of the companies with a car of the other company, occasioned by the conjoint negligence of said companies. The time, place, and circumstances of the collision, without more, are strongly presumptive of the gross negligence of one, if not both, of the defendant companies. Their respective cars were approaching each other on a wide, level, and well-lighted street, and in full view of each other, and yet they collided at the crossing. As is quite natural in such cases, each of the alleged wrongdoers, in endeavoring to exculpate itself, was not unwilling to make it appear that the other alone was the culpable party, while both endeavored to show that plaintiff

himself was guilty of contributory negligence that would bar a recovery against either. On the other hand, the plaintiff was endeavoring to successfully bear the burden he had assumed of proving that the collision was the direct result of the conjoint negligence of the defendant companies. The trend of such trilateral controversies is generally towards the fuller development of the facts.

Without undertaking to review the testimony, or even to refer specially to its more salient points, it is sufficient to say that a careful consideration of it has satisfied us that it presented questions of fact, relating to the negligence of each defendant, and also to the alleged contributory negligence of the plaintiff himself, which the jury alone could legally determine. The testimony was all for them, and not for the court; and it was submitted in a fair and impartial charge, in which we find no substantial error. There is nothing in either of the three specifications that requires further notice.

Judgment affirmed.

SEELEY V. CITIZENS' TRACTION COMPANY.

Supreme Court, Pennsylvania, January, 1897.

INJURED IN STREET CAR—RELEASE—SUBSEQUENT INJURY.—

Where plaintiff was injured by the sudden stopping of a street car, and she signed a release to the company for a specified sum, but subsequent developments showed that she had suffered to a greater extent than was apparent at the time of the release, such fact will not vitiate the release, and plaintiff cannot recover for such extended nature of the injury sustained.

APPEAL from Court of Common Pleas, Allegheny county. From a judgment for defendant, plaintiff appeals. The facts appear in the opinion.

A. H. & H. H. ROWLAND and JAMES FITZSIMMONS, for appellant.
GEO. C. WILSON and WM. D. EVANS, for appellee.

DEAN, J.—On 27th of October, 1892, while plaintiff was a passenger in defendant's street car in Pittsburg, by an accident the car was suddenly stopped. She, by the shock, was thrown to the floor and injured. At first her injuries were apparently slight, but she alleges that afterwards they became of such an aggravated character as to cause great suffering and permanent disability. Therefore, on 4th February, 1895, she brought this suit against defendant for damages, averring her injuries to be the result of its negligence in

the construction of or non-repair of the railway track. On the trial, defendant put in evidence a formal release under seal, executed by plaintiff, by which, for the consideration of \$25, she absolutely relinquished all further claim for damages. This release was signed on the 2d of November, the sixth day after the accident. The plaintiff alleged that at that date she was wholly ignorant of the character and extent of her injuries, and did not comprehend the nature of the writing. The court below was of opinion the paper was a complete defense, and so instructed the jury, who found for defendant. From the judgment entered on the verdict plaintiff appeals, assigning for error the instruction of the court. On the evidence it was not clear that negligence could properly be imputed to defendant, and it was far from clear that plaintiff's injuries at time of trial could be properly attributed to the accident; but, assuming the jury would have found in her favor on both questions, the written release effectually barred her road to a verdict. There was no evidence that it was procured by any fraud or overreaching on part of defendant. She was a woman of intelligence, and at least of fair education. Discussion of the terms and negotiations preceded its execution. She had ample opportunity to consult her friends as to the advisability of signing it. Why, then, should she not be bound by it? The substance of the whole argument of appellant is that subsequent events have demonstrated she made a bad bargain. This would set aside one-half the most solemn written contracts entered into. The evidence of plaintiff herself shows she comprehended fully the terms of the settlement, and that it was consummated because at the time she believed it was a favorable one to her. Admit she did not foresee the future, and did not know the extent of the injuries she had received, that only proves that what was unknown to her could not have been known to the other party to the release, and, therefore, no concealment of a material fact could be imputed to defendant. No judge sitting as a chancellor could for one moment hesitate as to his duty to declare that the evidence here was wholly insufficient to move him to cancel this instrument, or to permit a jury to touch it. All the assignments of error are overruled, and the judgment is affirmed.

**REBER v. PITTSBURG AND B. TRACTION
COMPANY.**

Supreme Court, Pennsylvania, January, 1897.

RIDING ON PLATFORM OF ELECTRIC CAR—SPEED OF CAR—NEGLIGENCE FOR JURY.—Where a passenger, by invitation or permission, was riding on the rear platform of an electric street car, and while the car was turning a sharp curve he was thrown from the car, due to the great speed with which the car was traveling, the questions, as to whether the speed at which the car was traveling was negligence, and whether the plaintiff was negligent in standing on the platform, were for the jury to determine, and the case was properly submitted to the jury.

APPEAL by defendant from judgment rendered for plaintiff in the Court of Common Pleas, Allegheny county.

A. W. DUFF and W. F. WISE, for appellant.

W. J. BRENNEN, for appellee.

The only question considered was whether the case should have been withdrawn from the jury. From the facts in evidence it appeared that plaintiff, late at night, got on a crowded car of defendant company to go to his home. There was no room inside, and he stood with a number of other passengers on the rear platform. His position on the platform was a comparatively safe one, as he stood between the controller and the brake, facing forward, with his back against the railing of the platform. After riding some distance he was requested by the conductor, who desired to use the trolley rope, to change his position. He then attempted to enter the car, but because of its crowded condition was unable to do so, and he took a position which the conductor told him to take at the outer edge of the platform, near the step, and stood with his back to the car, holding with his right hand to the iron railing behind him. While he was in this position the electric current was turned off, causing the lights to be extinguished, and the car was allowed to run at the rate of fifteen or twenty miles an hour down a grade in which there was a sharp curve. When the car struck the curve the plaintiff's hold of the railing was broken, and he was thrown off. It was the habitual custom of the company to carry passengers on the platform of its cars, and the plaintiff was there with the consent of the conductor, and was unable to get elsewhere on the car. The plaintiff was familiar with the locality, knew of the curve, and was aware of the danger of his position. In reviewing the question the court said:

APPEAL from judgment for plaintiff rendered in Court of Common Pleas, Allegheny county. The facts appear in the opinion.

WM. M. HALL, JR., for appellant.

YOUNG & TRENT, for appellee.

STERRETT, C. J.—The question presented by the single specification of error in this case is whether the testimony relating to the defendant company's negligence, and the alleged contributory negligence of the plaintiff himself, was of such a character as to justify its submission to the jury. The learned trial judge, being of opinion that it was, refused the defendant's request for binding instructions, and submitted both questions to the jury in a very elaborate charge, to which no exception was taken. In defending his action in thus ruling, a detailed review of the testimony is wholly unnecessary. A brief reference to the salient facts and the character of the evidence will be quite sufficient for the purpose. The explosion which caused plaintiff's injury occurred February, 1895, in a tobacco and cigar manufactory on Ohio street, Allegheny City. The building was not supplied with either natural or artificial gas, or with pipes for conducting the same. The defendant company had two lines of pipe laid in the street in front of the building, one of which was an eight-inch pipe, used for the general distribution of gas in that neighborhood, and the other a three-inch pipe, used in supplying gas to premises quite near the exploded building. This pipe passed within a few feet of the cellar wall of said building. Some months prior to the accident, a sewer pipe was laid from the rear of the building, through the cellar, and out beneath the smaller gas pipe, and thence into the main sewer in Ohio street. The soil in the neighborhood was composed largely of sand and gravel. Plaintiff's theory of the explosion was that gas had been escaping from a break in the smaller pipe for some time, and passed through the loose soil until it reached the recently laid sewer pipe, and thence followed the same into the cellar, where it had been accumulating until the explosion occurred. In support of this theory, part of the evidence was to the effect that escaping gas had been detected at that point for a couple of weeks prior thereto. The explosion occurred immediately after the trapdoor leading to the cellar was opened, and soon thereafter, when the gas pipe immediately in front of the premises was uncovered, an old rusty break therein was discovered. It was also testified, on behalf of the plaintiff, that, more than two weeks before the accident, defendant company was notified of the presence of escaping gas in the neighborhood, but nothing was done in response thereto. It was denied that any such notice was given, and testimony in rebuttal of plaintiff's case generally was introduced by the

defendant. Without further reference to the testimony introduced by the respective parties, it is sufficient to say it was more or less conflicting, and presented questions of fact which a jury alone could legally determine. It, therefore, follows that there was no error in refusing to charge "that, under all the evidence in the case, there can be no recovery by the plaintiff."

Judgment affirmed.

TOOHEY V. EQUITABLE GAS COMPANY.

Supreme Court, Pennsylvania, January, 1897.

EMPLOYEE INJURED IN GAS EXPLOSION.—Where it was the duty of an employee of a gas company to test new gas wells, the selection of the necessary apparatus being left to him, and in the course of his duties he is injured by an explosion, he cannot recover, as he assumed all risks incident to his employment.

APPEAL from judgment for plaintiff rendered in Court of Common Pleas, Allegheny county.

WATSON & McCLEAVE, for appellant.

THOMAS M. BROWN and A. M. BROWN, for appellee.

Plaintiff was employed by defendant corporation as field superintendent in their business of production, transportation and sale of natural gas. His business included a general oversight over the drilling of gas wells, over the shutting in and testing of wells in which gas was found, and over the connecting of such wells with the general line as showed a sufficient pressure of gas for that purpose. He had occupied the position for about two years, and was familiar with its duties and dangers. In June, 1892, while engaged in shutting in a new well, known as the "Kidd Well," and testing its pressure, he was injured by the explosion of a valve, for which injury he brought this action. It appeared that plaintiff had made all arrangements for testing the well in question and selected and ordered all the fittings and valves to be used without conference or advice from any officer of the corporation, and that when the defendant's superintendent and a few other persons came to ascertain the pressure of the gas, everything was in readiness. When the gas was turned on an eight-inch valve gave way, and plaintiff was injured. The shutting in and testing of the well, and the selection of the fittings, was part of the duties of plaintiff, and the risk involved was a risk incident to his business. If the fittings selected

proved to be too light for the pressure to which they were subjected, the plaintiff himself, and not the defendant, was negligent. If there was a defect which could not be detected at the time of selection, that was an accident due to causes not under the control of either employer or employee.

Judgment reversed.

Opinion by WILLIAMS, J.

HIGHTOWER V. BAMBERG COTTON MILLS.

Supreme Court, South Carolina, January, 1897.

MASTER AND SERVANT—EMPLOYEE OPERATING DANGEROUS MACHINE.—Where there was evidence tending to show that the plaintiff was known by the defendant to be inexperienced and was set to work at a dangerous machine without instructions as to its dangerous character not apparent, viz.: a part of the machine concealed from view, continuing to run by its own momentum after the rest of the machine had stopped, a nonsuit was error.

APPEAL from judgment order of Common Pleas, Circuit Court of Barnwell county, granting nonsuit in action by Hardy E. Hightower against defendant, for damages for personal injuries while employed in defendant's mill at a machine called a picker the machinery of which was concealed in a box, and that continued to revolve after the rest of the machinery was still. The plaintiff put his hand in the box for the purpose of cleaning the machinery, and was injured.

BELLINGER, TOWNSEND & O'BANNON & P. C. HARDWICK, for appellant.

ROBERT ALDRICH and IZLAR BROS., for respondent.

GARY, J.—This is an appeal from an order of nonsuit. The complaint, the reasons assigned by his honor, Judge Aldrich, for granting the order of nonsuit, and appellant's exceptions will be set out in the report of the case. Testimony was introduced in behalf of the plaintiff tending to show: 1. That the plaintiff was inexperienced in mill work. 2. That this was known to the defendant. 3. That the "beater" which caused the injury, was not only a dangerous piece of machinery, but its danger was latent. 4. That the plaintiff was not aware of the fact that the "beater" revolved by its own momentum for two or three minutes after it appeared that all the machinery had stopped, neither the defendant nor its servants having pointed out such danger to him. 5. That, if the plaintiff had known this fact, the injury would not have happened. When

a master is aware of the inexperience of his servant in regard to such machinery as is not only dangerous, but the danger is not apparent, it is his duty to warn the servant of the hidden danger. There was competent testimony introduced in this case to sustain the material allegations of the complaint, and, therefore, the order of nonsuit was erroneous. As the case must be remanded for a new trial, and as a lengthy discussion of the issues might tend to prejudice either the plaintiff or the defendant, the court deems it best to state its conclusions thus concisely. It is the judgment of this court that the order of the Circuit Court be reversed.

WARD v. LOUISVILLE AND NASHVILLE RAILROAD COMPANY.

Supreme Court, Tennessee, January, 1897.

INJURED WHILE ASSISTING BRAKEMAN—RAILROAD COMPANY LIABLE.—Where a person, at the invitation of a brakeman of defendant, assisted in moving a car for the better convenience of shipping goods belonging to plaintiff's employer, and while so doing is injured, the negligence is not that of a fellow-servant, and although such assistance was not actually needed, the company is liable.

APPEAL from judgment for plaintiff for \$1,075 and costs, rendered in the Circuit Court, Maury county.

VOORHIES & FOWLER and JAMES A. SMIZER, for plaintiff.

GEORGE T. HUGHES & SON, for defendant.

Plaintiff was engaged by several parties at Mt. Pleasant to load potatoes in barrels from wagons into the cars which were placed upon the side tracks. It was necessary for the more convenient and expeditious loading of the potatoes to have the cars moved to another point on the side tracks, where the cars could be more readily reached by the wagons. At the request of Bibb, brakeman on the train, plaintiff went on top of a car to assist in placing it at a convenient and proper place, and while so engaged the engine struck the car with force and violence, and plaintiff was thrown to the ground, and had his foot crushed by the cars running over it. It was customary to require shippers to load the cars upon the side tracks, and the railroad company and employees placed the cars at convenient places for that purpose. The main, and perhaps only, question in this case was admirably stated by opposing counsel, and plainly and very pointedly put to the jury in an admirable charge by

the court. The contention of defendant railroad company is that the company had sufficient crew to place the cars properly, and would have done so, and there was no emergency or necessity for the plaintiff to aid in this work, and in so doing he was a mere volunteer, or acting under the unauthorized invitation of the brakeman, and became a fellow-servant with him and the engineer, and hence he was not entitled to recover. The theory of plaintiff is that it was necessary to replace the cars in another position, and that he and his employers had an interest in having them so placed in order to expedite their own work; and hence he was not a fellow-servant with company's employees, but was engaged in his employer's work, and was entitled to recover for the negligent acts of the company's servants.

It is earnestly insisted, however, that the rule of liability cannot exist unless there was a necessity on the part of the railroad to have the services of the plaintiff, and that, if the business was that of the railroad, and it had sufficient force to perform it, then the plaintiff must be considered a volunteer and intermeddler. But none of these cases holding the company liable proceed upon this ground, but upon the more satisfactory one, whether the plaintiff is to be regarded in such cases as expediting and forwarding his own business or that of the railroad company, either as an accommodation or as a necessary help. In other words, was he engaged in his own business, or that of the railroad? If the former, the road is liable if there is negligence; if the latter, he is not, because the negligence is that of a fellow-servant. And this is equally so whether his aid is necessary to the road's performance of its duty or not. The emergency or necessity which will authorize him to aid the railroad and protect him in so doing is one that arises in his own business, and not in that of the railroad company. The questions of fact in this case were properly left to the jury; that is, as to whether plaintiff was a mere volunteer, aiding the brakeman on his invitation, or whether he was acting in his own interest and that of his employers. The question of negligence in the servants of the railroad company was left to the jury, and they were told that in no event could the plaintiff recover unless the railroad company was negligent. The matter was properly submitted to the jury under a proper charge.

Judgment affirmed.

Opinion by WILKES, J.

ST. LOUIS SOUTHWESTERN RAILWAY COMPANY v. CATES.

Court of Civil Appeals, Texas, January, 1897.

DELAY IN SHIPMENT OF GOODS — CONTRACT — EVIDENCE.— In an action for damages for delay in transporting goods the bill of lading is the best evidence of the contract for shipment and delivery, and parol evidence is not admissible to vary or contradict that which is written.

REFUSAL TO ACCEPT GOODS — LOSS — INSTRUCTION.— Where plaintiff refused to receive goods from a carrier, and then sued for damage by delay in delivery, it was error to refuse to charge that if loss resulted from plaintiff's failure to accept, he cannot recover for such loss.

PARTIAL DAMAGES — INSTRUCTION.— In such action it was also error to refuse to charge that if the goods were only partially damaged, plaintiff could only recover for such damage.

SPECIAL DAMAGES.— In order to recover special damages it must be shown that the carrier was notified of the necessity of prompt delivery or had knowledge from the nature of the goods that such speedy delivery was necessary.

APPEAL from judgment rendered for plaintiff in the Smith County Court.

MARSH & MCILWAINE, for appellant.

The appellee, in November, 1893, contracted with several persons for the sale of and delivery to them, at Alba, in Wood county, of a quantity of fruit trees and vines; the delivery to be made on November 30. On November 24, appellee, by his agent, one Francis, delivered for shipment to Alba, to the agent of the Southeastern Texas Railway Company at Selman, the trees and vines which he had contracted to sell as aforesaid, with instructions to said agents to make the shipment from Tyler to Greenville, by the International & Great Northern Railway, and from thence to Alba by the Missouri, Kansas & Texas Railway; but the Southeastern Railway delivered the goods at Tyler to the appellant's road, by which they were taken to Greenville, and thence to Alba, by the Missouri, Kansas & Texas Railroad, and were received by the agent of the latter road at Alba on the evening of December 5, 1893; and the appellee, who was in Alba, was notified of the receipt of the goods on the next day, but he refused to receive them, and brought suit to recover of the appellant the price for which he had contracted to sell them, to wit, \$334.35. The petition alleged that the said agent of the

Southeastern Railway was fully informed at the time of delivery to them of the said vines and fruit trees of the nature and character of the freight he was receiving, and that the same was contracted to be delivered on November 30, and that, unless they were delivered at that time, the contract of sale would be forfeited, and that plaintiff would be damaged to the extent of the value of said articles, and that the said shrubbery and vines were in such condition that any unusual delay in delivering them would result in their ruin. The petition averred further that said Tyler & Southeastern Railway, in receiving and contracting to deliver said freight at Alba, were the agents of the defendant, and transmitted to appellant the said goods at Tyler, and that defendant accepted the same subject to the contract entered into by its said agent with plaintiff, and with full notice and information of the character of said goods, and the importance of their prompt transmission, and of plaintiff's contract with his customers for the delivery of said goods on November 30, 1893; and that defendant received the goods at Tyler on November 25; that through the negligence of the defendant the said goods remained in its possession about ten days, and by reason of such negligence in the transmission of said freight by defendant, plaintiff was prevented from delivering to his customers the shrubbery and vines, which they had purchased from plaintiff, and, plaintiff being unable to comply with said contracts of sale, the same were forfeited, the purchasers refusing to receive the said goods contracted for by them; and that the said shrubs and vines were a total loss to him. The plaintiff also sued to recover alleged expenses incurred by him in hunting for the freight as shipped by him, between November 30, and December 6. The defendant answered by general and special exceptions, and by general denial, and by special denial under oath, that the Southeastern Railway was the agent of defendant in receiving said freight, or that said road had any authority to bind defendant by contract. The answer averred that defendant had no knowledge of the alleged circumstances under which the said goods were received by said Southeastern Railway, or that said trees and vines had been sold, when they were received from its connecting line at Tyler. Upon trial of the case a verdict and judgment were rendered for the plaintiff against defendant for \$191.47 1-2. The evidence shows that the goods were delivered, as averred, to the agent of the Southeastern Railway, at Mt. Selman, in Cherokee county, on November 24, 1893; and that said agent was distinctly informed at the time by plaintiff's agent that the shrubbery and vines had been sold, and plaintiff had contracted to deliver them at Alba, in Wood county, on November 30; and that, if they could not be

delivered by that date, he would not ship them, but would express them. And said agent for the railway informed the plaintiff's agent that there would be no delay in the shipment of the freight, and there was no reason why the said goods should not be delivered; and, upon receiving this assurance from the agent of the railway, plaintiff's agent shipped the goods, and received from the railway a bill of lading executed in the usual form of such instruments, but the bill contained no stipulation for the delivery of the freight by the 30th of November, or any recitals showing the nature and character of the goods shipped. The freight was taken by the Southeastern Railway to Tyler, and there delivered to appellant, as appears from pleadings of appellant, on November 25, for shipment to Alba via Greenville; and said goods were received at Greenville by the agent of the Missouri, Kansas & Texas Railway from the appellant's road, as appears from the testimony of the agent of the Missouri, Kansas & Texas Company, on or about December 4, 1893, and were forwarded by first local freight train leaving Greenville for Alba. But there was no evidence submitted on the trial to sustain the averment that the Southeastern Railway was the agent of appellant in receiving said freight from plaintiff, or that the former was authorized to bind the latter by contract. The plaintiff refused to receive the goods, and testified that they were worthless when tendered to him. There was other evidence showing that the damage, if any, to the trees and vines, when they were received at Alba, was but partial; and that many of the trees, after remaining in the depot for six or eight weeks, were planted by several persons, and that a large portion of those so planted were living when the case was tried.

The appellant, in its brief, presented for consideration its fifth assignment of error, namely, that the court erred in permitting a witness to testify to a purported conversation had, and contract entered into by him, with the agent of the Tyler & Southeastern Railway Company, at Mt. Selman, by which he undertook to deliver said trees at Alba by November 30, 1893. This assignment is sustained. The bill of lading was the best evidence of the contract for the shipment and delivery of the goods. Contemporaneous parol evidence is not admissible to vary or contradict that which is written. Besides, the contract which the witness testified to was not made with the appellant, but with the Tyler & Southeastern Railway; and the evidence fails to sustain the averment of the petition that said railway was the agent of the appellant, and, as such agent, received and receipted for the goods shipped by the plaintiff.

Other assignments of error were the refusal of the court to give certain instructions upon the question of partial and special damages, which assignments were sustained, and for the errors indicated the judgment was reversed.

Opinion by PLEASANTS, J.

GALVESTON, HARRISBURG AND SAN ANTONIO RAILWAY COMPANY V. EFRON ET AL.

Court of Civil Appeals, Texas, January, 1897.

CARRIER OF FREIGHT—MEASURE OF DAMAGES.—Where freight on goods has been paid and the goods are lost, the market-value of the goods at the point of destination, with interest, is the measure of damages, but where cotton is destroyed in transit, proof as to the contract-price is not sufficient to show the market-value.

COTTON LOST BY FIRE—BURDEN OF PROOF.—In a contract exempting the carrier from loss by fire, of cotton, the burden is upon the carrier to show that the cotton was destroyed by fire and that such fire was not the result of the carrier's negligence.

APPEAL by defendant company from judgment rendered for plaintiffs in the District Court, Bexar county.

UPSON, BERGSTROM & NEWTON, for appellant.

LEROY & SEHORN, for appellees.

Appellees sued appellant to recover \$1,554.30, the value of forty-seven bales of cotton, which was delivered to appellant at Seguin, Tex., to be transported to Paris, Ontario, Canada, but which appellant failed to transport, but converted to its own use. Appellant answered that it had received the cotton from appellees under a written contract, which provided, among other things, that appellant should not be held liable for damages from fire not caused by its negligence, and that the cotton, while on its cars, had been burned, without negligence on its part, or on the part of its servants or agents, and it was not, therefore, liable in any sum, except \$114.10, realized by it from the sale of damaged cotton, which was deposited in court. The cause was presented to the court, without a jury, and judgment rendered for appellees for \$1,683.82.

The measure of damages in this case, the freight having been paid, was the market-value of the cotton at the point of destination, with interest. The only evidence of the value of the cotton in Paris, Ontario, Canada, was the testimony of Efron and Ahrstein,

that the cotton had been contracted to be sold in the place named for seven and one-eighth cents per pound when delivered, and it was urged that this was not proof of the market-value at that place. The contention is well founded. It appears that the cotton was contracted for in November, and was delivered for the shipment on December 10, and, if it had been expeditiously transported could not have arrived at the point in Canada for which it was destined before December 30. If the price for which an article is sold would be evidence in any case of market-value, it could not be in this case. The fluctuation in the cotton market is a matter universally known, and if the contract of sale fixed the market-value in November, it certainly could not do so one month afterwards. Appellees sued for the market value of the cotton, and not for any certain sum for which they had contracted, and which they had been prevented from receiving by the failure to deliver.

Allegation and proof of delivery of the cotton to appellant, and the failure to transport the same to point of destination, made out a *prima facie* case of negligence against appellant; and, unless the latter showed that the cotton was lost by one of the exceptions known to the common law, or one of the exceptions embodied in the contract of shipment, appellees would be entitled to recover (1). The burden, therefore, was upon appellant to show that the cotton was destroyed by fire, and that such fire was not the result of the negligence of appellant. As to whether this was done was a question of fact, to be determined by the jury, or, in the absence of a jury, by the trial judge. As there was no proof of market-value of the cotton at its point of destination at the time that it should have arrived, judgment was reversed (2).

Opinion by FLV, J.

1. Citing *Ryan v. Railway Co.*, 65 Tex. 13; *Railway Co. v. Horne*, 69 Tex. 643, 9 S. W. Rep. 440; *Missouri Pac. R. Co. v. China Mfg. Co.*, 79 Tex. 26, 14 S. W. Rep. 785.
2. A rehearing in this case was denied.

TEXAS PACIFIC RAILWAY COMPANY V. JOHNSON.

Supreme Court, Texas, January, 1897.

KNOWLEDGE OF REPUTATION OF CONDUCTOR.—The general reputation of a servant of a railway company as a reckless conductor does not affect a party suing for damages for injury, unless it is shown that the latter had knowledge of the servant's character or reputation as such.

RAILROAD WRECK—RECKLESS CONDUCTOR—BURDEN OF PROOF.—

Where the defense in an action to recover damages for injuries sustained in a railroad wreck is that plaintiff knew that the conductor of train was of a reckless character the burden is upon defendant to prove that plaintiff had such knowledge before the accident, and the fact that the conductor was recommended for appointment by plaintiff did not establish such knowledge, but, on the contrary, was presumptive evidence that he did not know of such reputation.

ACTION by Johnson against the railway company for damages for injury sustained in a railroad wreck. The trial resulted in verdict for plaintiff, which was reversed by the Court of Civil Appeals, but one of the judges of that court dissenting, the Supreme Court sustained the dissent, and the Court of Civil Appeals entered judgment in accordance therewith. From that judgment defendant made application for a writ of error.

T. J. FREEMAN & STANLEY, SPOONTS & THOMPSON, for applicant.

The points involved in the discussion between the Supreme Court and the Court of Civil Appeals on the proceedings in this action are omitted. The question decided turned upon a certain portion of the evidence. It appeared that Johnson was a brakeman in the employ of defendant, and that the wreck occurred while so employed. The conductor, Roberts, was a friend of Johnson, and the accident being alleged to be due to the conductor's recklessness, defendant sought to prove the general knowledge of the conductor's reputation, and that being so, defendant was not liable. It was held that the general reputation of Roberts as a reckless conductor did not affect the plaintiff, unless it was shown that he had knowledge of defendant's character or reputation as such. The burden was upon the defendant to prove that Johnson knew of the reckless character of Roberts as a conductor, or had notice of facts which would have put a reasonable man upon inquiry to ascertain his character, and that this knowledge was possessed by Johnson before the accident. The fact that Johnson recommended Roberts for appointment as

conductor does not tend to prove that he knew him to be a reckless and careless man as such, but, on the contrary, would show that he did not know of that fact at the time, because it will not be presumed that he would recommend a man who was so unfit for the position. Evidence was admitted that Johnson had spoken to an employee of the defendant as to the reckless character of Roberts, but the witness could not even say that he thought the conversation may have occurred before the accident. There was no proof whatever, and no evidence for the jury to consider upon this point.

Application for writ of error refused.

Opinion by BROWN, J.

CONLEY v. SHERMAN, SHREVEPORT AND SOUTHERN RAILWAY COMPANY.

Supreme Court, Texas, January, 1897.

CARRIER OF FREIGHT — BILL OF LADING REFUSED — WHEN NOT NEGLIGENCE.— It is not negligence on the part of a railway company to decline to give a bill of lading to a shipper of lumber where there was no means of weighing at the shipping station and the shipper did not give the necessary invoice from which the bill of lading could be made.

ACTION by plaintiff against defendant to recover statutory penalty for refusal of defendant to give bill of lading for lumber shipped by plaintiff. On the trial judgment was given for plaintiff, which was reversed by the Court of Civil Appeals of Third Supreme Judicial District. Plaintiff applied for writ of error.

J. W. BOLIN, for applicant.

The undisputed evidence in the case shows that at McIntyre switch, on defendant's road, there was no agent, and no scales upon which to weigh cars, and that it was the custom for shippers from that point to load the cars themselves, and that such cars were unloaded by the consignees at the point of destination. It was the custom for shippers, after having loaded their cars at the switch, to call upon the agent at Daingerfield, who would give a bill of lading for such cars as were reported to him by the shippers. Plaintiff had shipped considerable lumber from the same point prior to this time, and had never demanded a bill of lading different from that furnished by the agent on these occasions. When he requested a bill of lading for the cars in question, he knew the agent had no means of giving the amount of weight or quantity necessary to describe it in

the bill of lading, and plaintiff did not offer to furnish the information, although he had the invoices for the same. Under this state of facts, it could not be held that the agent of the railroad company did not refuse to deliver to plaintiff such bill of lading as the statute prescribes, and plaintiff had no right of action for the penalty imposed by the law. Judgment of Court of Civil Appeals was rightfully rendered.

Application for writ of error refused.

Opinion by BROWN, J.

CHILDRESS' ADM'X, v. CHESAPEAKE AND OHIO RAILWAY COMPANY.

Supreme Court of Appeals, Virginia, January, 1897.

STRUCK BY TRAIN ON CROSSING — CONTRIBUTORY NEGLIGENCE.—

Where plaintiff's intestate was crossing a railroad track, in a wagon, at a point where he could have seen a train approaching, from a considerable distance, but it appeared that he did not look or listen, that the usual signal from a train approaching a crossing was given, and that deceased was not seen by defendants' servants until within about 180 feet of him, but deceased paid no attention to the signals, an action against the railway company could not be maintained.

ERROR to Circuit Court, Henrico county. From a judgment for defendant, plaintiff appeals.

POLLARD & SANDS and W. H. SANDS, for plaintiff in error.

H. T. WICKHAM and HENRY TAYLOR, JR., for defendant in error.

Action to recover damages for the death of plaintiff's intestate, due to alleged negligence of the defendant company. The facts are substantially as follows: At the point where the accident occurred the county road leading from Richmond to Darbytown crosses the Chesapeake & Ohio Railway tracks so that a person passing along the wagon-way going from Richmond in the direction of Darbytown, would have upon his right hand an angle of about forty-five degrees, formed by the line of the county road intersecting the line of railway, and would have upon his left an angle formed by these two lines correspondingly greater than a right angle. At the point "C," as shown by the evidence and diagram, a traveler upon the county road passing from Richmond in the direction of the railroad has emerged from a cut (the embankment of which up to that point obstructs the view), so as to be able to see and to be seen from the

point "D" on the line of railway, which would be upon his left, and is 180 feet to the east of the intersection of the county road and railway. Between the cut and the railway there is a wagon road diverging from the Darbytown road to the left of the traveler, and therefore upon the side of the obtuse angle, into which a horse and vehicle could be guided without making an abrupt turn. From the point "C" to the railroad there is a descending grade, the degree of which is not stated. From the point "B," ten feet nearer the railroad than the point "C," there is an unobstructed view of the railway to the left and east for at least 1,800 feet. Upon the occasion of the death of the plaintiff's intestate, he was moving down the Darbytown road in an open vehicle drawn by a mule. The only direct evidence as to the accident is given by the engineer, fireman and brakeman of the train. From their testimony it appears that upon reaching the whistling post, placed at the usual distance to the east of the crossing, the appropriate signal was sounded, and thereupon the fireman commenced to ring the bell on the engine, and continued to ring it until the accident occurred. When within 180 feet of the crossing, Childress was seen by the engineer sitting upon the floor of his wagon, his mule moving in the direction of the crossing, and about fifty or sixty feet from it. The alarm whistle was immediately sounded, and the brakes applied, but Childress paid no attention whatever to the signals. He did not stop, or look, or listen, or appear to be in any way conscious of the approach of the train, notwithstanding the efforts to attract his attention. He might have stopped his mule. He might have turned from the road which led across the track into the road which passes between the cut and the line of railway. He did neither, but kept straight ahead, and the result was inevitable. The evidence shows that the slightest precaution upon his part would have avoided the accident, and that his own negligence not only contributed to his misfortune, but was its proximate cause. The record did not disclose any evidence tending to fix negligence upon the defendant company or its employees. There is some diversity among the witnesses as to the sounding of the alarm signals, which, according to the testimony of the engineer, fireman and brakeman, were given immediately upon the discovery of the position of the plaintiff's intestate; but there is no such contradiction between their statements and the testimony of witnesses adduced by the plaintiff in error as would require the rejection of the one and acceptance of the other. Some of the witnesses did not hear the danger signals which immediately preceded the accident, and they differ somewhat as to the order in which the signals were given, but there can be no doubt that the usual signal

was given at the whistling post, and that the bell was continuously rung from that time until the accident occurred; and the positive evidence of all who were in a position to speak with certainty is to the effect that the danger signals were given as soon as the necessity for them appeared.

Judgment affirmed.

Opinion by KEITH, P. J.

WICKHAM v. CHICAGO AND NORTHWESTERN RAILWAY COMPANY.

Supreme Court, Wisconsin, January, 1897.

BOY KILLED BY TRAIN WHILE TRYING TO CROSS TRACK IN CITY.—

Where there was evidence showing that a boy, between nine and ten years of age, ran from behind a freight train after it passed and across the track and was struck by a passenger train on the furthest of three tracks and killed, and that the usual signals were given, and the train was running only ten miles an hour, a nonsuit was proper.

APPEAL from judgment of Circuit Court, Milwaukee county, in favor of defendant in action by Horace Wickham, administrator, against defendant railroad.

ELLIOTT & HICKOX, for appellant.

WINKLER, FLANDERS, SMITH, BOTTOM & VILAS, for respondent.

The plaintiff's decedent was a boy between nine and ten years of age, and was struck and instantly killed by a passenger train within the city of Milwaukee. After a freight train had passed he attempted to cross the three tracks and was struck by passenger train on the furthest track. After all the evidence was in the court directed a verdict for the defendant. The settled rule is that a verdict for the defendant should not be directed unless the evidence is practically undisputed and all one way. *Jackson v. Town of Jacksonport*, 56 Wis. 310, 14 N. W. 296; *Radman v. Railroad Co.*, 78 Wis. 22, 47 N. W. 97. Four witnesses testified that the usual signals were given by the passenger train. Two witnesses testified that they heard no signals. The positive evidence must prevail. *Cook v. City of Racine*, 49 Wis. 243, 5 N. W. 352. The failure of the engineer to see the boy is explained by the fact that the boy was hidden by the passing freight train. The engineer testified that the train was running at the rate of ten miles an hour. The rate allowed in cities is fifteen miles an hour. *Laws 1891, ch. 467*. The case is

entirely without evidence to show where the boy came upon the track. So the evidence fails to show that the absence of a fence was the cause of the boy's death.

Judgment affirmed.

Opinion by NEWMAN, J.

ERDMAN v. ILLINOIS STEEL COMPANY.

Supreme Court, Wisconsin, January, 1897.

DEFECTIVE APPLIANCE.—An experienced machinist is presumed to know the danger of operating a four-foot circular saw that has a three inch crack in it and that makes 1,700 revolutions a minute.

STATEMENT OF EMPLOYEE.—The statement of such a machinist that he had no knowledge of the danger which such a defect would naturally suggest will not overcome the presumption that he had such knowledge.

ASSUMPTION OF RISK.—An employee knowing of the defect and of the danger, and continuing to work, is presumed to have assumed the risk.

SAME.—If the employee continues to work after protest, relying upon the employer's promise to repair, he assumes the risk if it is obvious and immediate.

APPEAL from Superior Court, Milwaukee county.

VAN DYKE, VAN DYKE & CARTER, for appellant.

C. J. FABER and AUSTIN & FABER, for respondent.

This was an action by Julius Erdman against the Illinois Steel Company to recover for personal injuries alleged to have been sustained while in defendant's employ as shearman, in sawing and shearing heated bars of iron by the use of a large circular saw, about four feet in diameter; the saw was set in a frame and so adjusted that it could be lowered upon iron placed under the saw to be cut; the complaint further alleged that before operations commenced on the day of the injury the attention of the foreman was called to the fact that the saw was cracked, defective and unfit for use; that the plaintiff and his co-employees protested against working with the defective saw, but relying on the assurance of the foreman that it was safe, and that he would furnish a new one after they had worked off one heat, they went to work; that soon after it broke and plaintiff was severely injured. The answer admitted the employment of plaintiff and the injury, put in issue all other allegations and set up contributory negligence. A person thirty-five years of age, and of fourteen years' experience with machinery, circumstanced as

plaintiff was, must be presumed to know the operation of natural laws and the dangers which such a defect as the one in question would naturally suggest to a person of ordinary intelligence. *Walsh v. Railway Co.*, 27 Minn. 367, 8 N. W. 145. This presumption is too strong to be rebutted so as to warrant a verdict to the contrary merely by the evidence of the person whose knowledge is in question, that he did not know of the existence of a danger which was obvious to a person of ordinary intelligence, even though not an expert. He must be presumed to have assumed the risk unless the case comes within some exception to the general rule. *Heath v. Mining Co.*, 65 Iowa, 737, 23 N. W. 148; *Anderson v. Lumber Co.*, 47 Minn. 128, 49 N. W. 664; *Hazen v. Lumber Co.*, 91 Wis. 208, 64 N. W. 857; *De Graff v. Railway Co.*, 76 N. Y. 125; *Hayden v. Mfg. Co.*, 29 Conn. 548; *Devlin v. Railway Co.*, 87 Mo. 545. From plaintiff's evidence it is apparent that he did not object to working with the defective saw. The attitude of plaintiff and his associates respecting the matter was merely whether they were going to be delayed or not, because the pay was by the ton, not by the day, instead of one of objection to or protest against proceeding with the defective saw. But, again, if the risk is obvious and immediate, that serious injury may probably result from a continuance of the work, then the doctrine that the employee can proceed, relying upon the promise to repair or to remove the danger, does not apply.

Judgment reversed.

Opinion by MARSHALL, J.

BULL V. PULLMAN PALACE CAR COMPANY (1).

United States Circuit Court, Southern District, New York, January, 1897.

INJURED ON SLEEPING CAR—COLLISION—CHARGE TO JURY.—

The Pullman Palace Car Company is not liable for the operation of a train to which one of its sleeping cars is attached, but it is liable if it does not employ competent servants to use the ordinary means to prevent accident to its passengers, provided the accident was due to the negligence of its servants.

1. This is the only case decided where there is any record which defines the liability of sleeping-car companies for negligence of its employees in charge of its cars, contributing to a collision.

Cases of assault and for stolen property are reported holding against the companies, but it is believed there are none for the negligence complained of in the operation of the train.

ACTION by Austin C. Bull, for damages for personal injuries sustained while a passenger on one of defendant's sleeping cars. The facts appear in the charge to the jury.

JOHN M. GARDNER, for plaintiff.

ALEXANDER and GREEN, for defendant.

SHIPMAN, J.—Gentlemen of the jury, this action is brought against the Pullman Palace Car Company to recover for damages which the plaintiff alleges that he received in consequence of the negligence of the employees of the defendant.

It is a fact that the Pullman sleeping car in which the plaintiff was a passenger on the evening of the accident left the track with two of its associated cars; that the wheels ran upon the ties or on the ground for a distance, and that then the three cars broke from the train, went down an embankment, and that the plaintiff, in consequence of some blow which he received during this calamity, suffered a rupture, or hernia, in his groin, which still remains, and which will probably be a permanent injury.

The law in regard to the liabilities of a railroad company which transports passengers for hire and a sleeping car company, which furnishes sleeping cars to the railroad company, is not the same. The Pullman Palace Car Company is not a common carrier, and, therefore, is not obliged to take extraordinary or the highest degree of care. It is obliged to take ordinary care for the comfort of its passengers and for their safety, so far as the car itself is concerned, and so far as the car is provided with appliances to prevent an impending calamity. For example, if a sleeping car is on fire at night. When it is occupied by passengers the company's employees must take ordinary care to extinguish the fire. The company should take ordinary care to appoint competent employees, and if it employs incompetent employees, who are ignorant of the ordinary and usual methods for preventing an impending calamity and who, by reason of their ignorance, omit the ordinary and usual methods which are at hand, and an injury happens to a passenger in consequence of such ignorance and omission, the company is liable for its lack of ordinary care.

The defendant is not in this case liable for the spreading of the rails, or for any negligence of the Erie Railroad Company, or for any deficiency in rails which belongs to the Erie Railroad to overcome. It is liable if it did not employ competent employees who do not know how to manage the ordinary means which exist in the car to prevent a calamity and who, in consequence of their ignorance, do not use the usual appliances which were present and which were

in good order, provided the calamity happened in consequence of such negligence.

You have heard the testimony of the witnesses. If the testimony of the plaintiff and his brother was the only testimony in the case, it would justify a finding that the only employee in the car was both incompetent and ignorant, and lost whatever intelligence he had and left the passengers to their fate. The question upon their testimony would still remain whether, if he had used all the appliances at his hand, the car would have been stopped in time to prevent the overthrow down the embankment. * * *

If you find that the plaintiff's story is true, and that the only employee in the car was an ignorant person who did not know what to do, and who ran away from the scene of danger, there would not be much doubt about this case. If you are satisfied, from the testimony of Sylvester and the other witnesses, that he, Sylvester, was in the car and promptly used the adequate means at his hand to immediately stop the train, and that he was prevented from doing anything more by the bolting of the car down the embankment, and that he was a competent person who immediately, instantaneously, used whatever means there were existing in the car to avert the danger, then, in my opinion, your verdict should be for the defendant.

There is still another question. Whether he used or did not use all the means at his command in order for the plaintiff to obtain a recovery, you must find that his injuries resulted from the negligence of the defendant's employees in charge of the car; that is, whether there was sufficient time, after an opportunity to use the appliances, to stop the car. If there was not sufficient time, and the employees of the defendant used promptly all the means that were at hand, and used the most adequate means, or if there was insufficient time to avert the calamity by the prompt use of the means at hand, the defendant would not be liable. * * *

HALEY v. KANSAS CITY, MEMPHIS AND BIRMINGHAM RAILROAD COMPANY.

Supreme Court, Alabama, January, 1897.

KILLED BY TRAIN—PLEADING—DEFECTIVE COMPLAINT.—In an action to recover for the death of a person killed by a train, the complaint alleged that defendant's servants wilfully ran a train, one of the cars of which had a plank placed so that it extended over the pathway, and that the plaintiff's intestate's death was due to such wilful running of the train: *Held*, that the complaint merely alleged wilfulness in running the train, and did not allege that the injuries were caused thereby.

PLEADING—DEMURRER.—In such action it was held that a complaint which alleges that the pathway was in common use by pedestrians, to the knowledge of defendant, and with such knowledge, its servants wilfully placed a plank on the car which extended over the pathway, and that the deceased was struck thereby, is not demurrable.

APPEAL from judgment rendered for defendant, on the pleadings, in the Circuit Court, Lamar County.

ARNOLDS & EVANS and S. J. SHIELDS, for appellant.

WALKER, PORTER & WALKER, for appellee.

On November 15, 1895, one S. F. Pennington, while walking along a path or footway, running parallel to and about five feet from the track of the Kansas City, Memphis & Birmingham Railroad Company, about three miles from Sulligent, in Lamar county, was struck by a plank, which projected from the side of a car of one of the railroad company's passing trains, and was killed. His administrator, O. F. Haley, brings the present action against the Kansas City, Memphis & Birmingham Railroad Company to recover damages for the alleged wrongful injury and death of said Pennington. The complaint as originally filed contained eight counts. Demurrers were sustained to the first, second, third, fourth, fifth, sixth and eighth counts, and the seventh count was withdrawn. After sustaining the demurrers, the second and sixth counts of the complaint were amended, and the complaint was further amended by the addition of two other counts, numbered nine and ten.

Thereupon the defendant filed a motion in writing to strike out from the second and sixth counts, as amended, and from the ninth and tenth counts, respectively, certain portions of said counts on the ground that they were "irrelevant and frivolous." The court sustained the motion, to which ruling the plaintiff excepted. The defendant then demurred to the counts, upon several grounds, the

substance of which was as follows: 1. The allegations of the complaint do not show that the defendant violated any duty it owed plaintiff's intestate. 2. Because it does not show that the defendant was guilty of negligence of which the plaintiff can complain. The allegations in each of the counts show that the plaintiff's intestate was a trespasser upon the defendant's roadbed, and that the defendant was guilty of simple negligence only. 3. There are no allegations in either of the counts which show that the injury and death to plaintiff's intestate was caused by the reckless, wilful or intentional conduct of the defendant or its servants. 4. "For that it is not shown in and by either of said counts that the said defendant owed the plaintiff's intestate any duty, but, on the contrary, 'it is shown in each of said counts that the plaintiff's intestate was a trespasser on the roadbed and right of way of said defendant at the time of said accident; and it is not shown in either of said counts that the defendant, or any of its agents or servants, were guilty of any such conduct as shows wilfulness, wantonness or recklessness on the part of defendant, or its agents or servants, in causing such accident.'" 5. "For that each of said counts show that plaintiff's intestate was guilty of negligence which proximately contributed to his injury and death." These demurrers were sustained, to which ruling the plaintiff duly and separately excepted; and the plaintiff declining to plead further, judgment was rendered for the defendant. The plaintiff appeals, and assigns as error the several rulings of the trial court to which exceptions were reserved.

It is not denied by appellant, plaintiff below, in the complaint he filed, that the footpath, about five feet from the defendant's railroad track, along which his intestate was walking when he was killed, was on the right of way of the railroad company, nor is it insisted in argument that it was not. Under the Constitution and laws of this State, defendant company had the right to condemn 100 feet of land for a right of way.

It is a well-settled rule of law that when one walks on the track or right of way of a railroad company, without invitation or license, he is a trespasser, to whom the company owes no duty except the exercise of reasonable care and diligence to avoid injuring him, as soon as his peril becomes apparent to the company's employees. It is only when the employees of the company operating the train fail to exercise reasonable care, to avoid injuring him after the trespasser has been discovered, and his peril of injury becomes apparent, that they are held to be guilty of wantonness, or recklessness, such as will overcome the contributory negligence of the trespasser.

The first, second, third, fourth, fifth, original sixth, and eighth

counts, and the second amended count, were all defective, in that they show the plaintiff's intestate was a trespasser on the right of way of the railroad, at the time he was killed, and they do not aver wilfulness and wantonness in causing the injury on the part of the employees controlling and operating the train. The sixth and eighth counts (the seventh having been withdrawn) are the only ones in the original complaint in which there was an attempt to aver wilfulness or wantonness. The averment of the sixth is, that defendant's "servants and employees knowingly and wilfully propelled a train of cars on the track of defendant's road, having a plank needlessly placed on one of its cars so being propelled, * * * so as to extend over and upon the pathway aforesaid," and "that the death of said S. F. Pennington was due to the wilful and knowingly propelling said train of cars on the track of defendant's road, at and by the place aforesaid, while having the plank or timber aforesaid projecting over and beyond the side of said train as aforesaid." The averments of the eighth count in this respect are substantially the same as those in the sixth, though differing somewhat in verbiage. It will be seen that these averments are no more than that the wilfulness or wantonness attempted to be averred, consisting in propelling the train, and in knowingly and intentionally placing on a car belonging to the train a plank that extended over the footpath, which are not proper allegations of wilfulness or wantonness in causing the injury.

The sixth count, as amended, and the ninth and tenth counts, allege substantially the same thing,— "that said path or footway was commonly used by pedestrians, so that many persons were daily and constantly passing and repassing thereon, which fact the defendant, its servants and employees in charge of said train well knew, and knowing the danger to such persons, and in utter disregard of and indifference to their safety, did knowingly and wilfully place on one of the cars in said train the said wooden plank,—as described in the other counts,—and did knowingly, wilfully or intentionally propel said train of cars along the track at the place designated, and thereby caused the death of plaintiff's intestate." If the facts here averred be true, it was the duty of those operating the train,—which arose from likelihood that at that place there would be persons on the track—to guard against inflicting death or injury at such a place by means of an extraordinary danger of defendant's own creation. Under such circumstances, the law imputes to those operating the train a knowledge of the perilous condition of persons passing at such a place, neglect to provide against which is recklessness such as amounts to wantonness. The duty to keep a lookout for persons

is not specially imposed by statute, and yet it is the duty of trainmen when running through a city, town or village, thickly populated, and it is likely that persons will be on the track, to keep a lookout. "The duty arises when the circumstances and conditions call for its exercise, and which are known to those operating the train." *Railroad Co. v. Meadors*, 95 Ala. 137, 10 South. Rep. 142; *Railway Co. v. Wood*, 86 Ala. 164, 5 South. Rep. 463. There is no reason why this doctrine does not apply as well to densely populated neighborhoods in the country, when the conditions exist such as are here averred, as to cities, towns, and villages. It is the likelihood of peril to the safety of passers-by, known to defendant's employees, that makes the duty, and not the place itself. There was error in striking out the portions of these counts, and in sustaining the demurrer to them.

Judgment reversed.

Opinion by HARALSON, J.

MATTHEWS v. BULL.

Supreme Court, California, February, 1897.

MASTER AND SERVANT—LIABILITY UNDER STATUTE.—The Civil Code, § 1971, provides that "an employer must in all cases indemnify his employee for losses caused by the former's want of care," and this applies where an employer retains an incompetent servant after he has knowledge of such incompetency, and he is liable for injuries sustained by another employee by reason of such incompetency.

INJURED BY FALL OF HAMMER—NEGLIGENT SIGNAL.—An employer cannot evade responsibility for injury to an employee where the selection of competent servants is intrusted to another and where the employee is injured by the fall of a pile-driver hammer due to negligent signal of the foreman, the master is liable.

FROM a judgment for plaintiff for \$1,500 in the Superior Court, Humboldt County, defendant appeals.

S. M. BOCK and F. A. CUTLER, for appellant.

L. F. PORTER and J. N. GILLETT, for respondent.

Action to recover damages for an injury sustained by plaintiff while in the employ of defendant. In 1895 the defendant was engaged in constructing jetties at the entrance to Humboldt Bay. A portion of the work to be done was the driving of piles. R. T. Stone was the superintendent of the work on the south jetty, with authority to hire and discharge all the men employed on that jetty. In April he hired the plaintiff as a common laborer, and also hired

Robert Astleford to act as foreman of the pile-driver crew. Plaintiff commenced at once, and thereafter continued to perform the work assigned to him, until May 7, when he was injured. Astleford commenced at once to act as foreman of the crew, and continued to so act until May 15, when he was discharged. On May 7, a large pile having been put in place to be driven, Astleford directed the plaintiff to go up the driver and put a ring on the top of the pile. Plaintiff thereupon climbed up the ladder to the third staging, about twenty-four feet above the base, and then pulled the ring up by a rope attached to it. The ring was about sixteen inches in diameter, and weighed from forty to forty-five pounds. Astleford was standing at the foot of the driver, close up to the pile, where he could not see the plaintiff, and from that point he halloosed to the plaintiff to put on the ring. Plaintiff started to put the ring on the pile, was just shoving it over with his right hand, when Astleford, having waited only from a quarter to a half of a minute after halloosing, signaled to the engineer to let the hammer fall, and he did so. The hammer struck on plaintiff's hand, and crushed it so that it had to be amputated, and this is the injury complained of. It was the custom, when a man went aloft to put the ring on a pile for him, as soon as he had it in place, to signal to the foreman, and he then signaled to the engineer to let the hammer fall. But on this occasion the plaintiff, as he testified, gave no signal whatever. And if Astleford had stepped aside a few feet, to the place where he usually stood when such was being done, he could have seen the plaintiff, and seen when the ring was in place. It is alleged in the complaint that Astleford was the foreman of the pile-driver crew of which plaintiff was a member; that the work of constructing said jetty was of a dangerous character, and required skill, prudence, knowledge, and carefulness on the part of those in charge thereof, and that it was the duty of defendant to provide men possessing all these qualifications; that the said Astleford, by reason of his habitual carelessness and negligence, was incompetent to have charge of said work, of which fact defendant had due notice; that he was constantly exposing those under him to unnecessary dangers and risks, which fact defendant well knew, having almost daily notice thereof; that the defendant, well knowing said Astleford to be an incompetent, careless and negligent man in the work in which he was employed, carelessly and negligently retained him in such employment as foreman of said crew; and that the said Astleford, on May 7, 1895, carelessly and negligently caused the hammer of the pile driver to drop upon plaintiff's right hand, crushing and bruising it to such an extent that it had to be amputated. The answer denied all the averments

as to carelessness and incompetency of Astleford and alleged that the injury was due to plaintiff's own fault and carelessness and not to any carelessness or negligence of said Astleford.

The omission to allege that plaintiff did not know of Astleford's incompetency was not fatally defective, it not being necessary to allege in complaint that plaintiff was without fault or negligence. When contributory negligence is a defense the burden is on defendant to prove it. The facts as to incompetency and negligence of Astleford and defendant's knowledge thereof were for the jury to determine, and their verdict would not be disturbed.

The Civil Code, sec. 1971, provides that "an employer must, in all cases, indemnify his employee for losses caused by the former's want of ordinary care" and this applies as well to the retention of an unfit employee after knowledge of the fact, as by a failure to use due diligence at the time of his selection. Under the law thus declared and the facts as found by the jury, plaintiff was clearly entitled to recover damages for his injuries. Where the master delegates the selection of employees to another, the negligence of the agent is the negligence of the master, and an instruction to that effect is correct. There was no error in charging the jury that "the act complained of here as being negligent was the giving of the signal to the engineer by Astleford to let the hammer fall before the proper signal had been communicated to Astleford," and that "unless Astleford carelessly and negligently gave the signal to the engineer to drop the hammer, your verdict must be for defendant." Judgment affirmed.

Opinion by BELCHER, C.

LEE v. SOUTHERN PACIFIC RAILROAD COMPANY.

Supreme Court, California, February, 1897.

EMPLOYEE INJURED ON RAILROAD TRACK—PLEADING—VARIANCE.—Where a person avers that he is in the employ of one railroad company, but it appears that he was in the employ of another, the former having leased its road to the latter, and while so employed he was injured by reason of defective construction of road-bed, the variance in the averment is immaterial, as the proof showed that the injury occurred while lawfully upon the road-bed, and judgment should have been entered for plaintiff.

APPEAL from judgment entered for defendant in the Superior Court, Los Angeles County. There were special findings and a

general verdict for plaintiff, but judgment was entered for defendant and plaintiff appeals.

COLE & COLE, for appellant.

BICKNELL & TRASK, for respondent.

Plaintiff brought this action against the Southern Pacific Railroad Company to recover damages for personal injuries sustained by him. He pleaded that the defendant was the owner of a certain railroad in the county of Los Angeles, and of its roadway, tracks and appurtenances; that, at the time of the injuries complained of he was employed by the defendant as a brakeman; and that while in the performance of his duties as brakeman, at a siding called Honby, on the line of the road, he was thrown from an engine upon which he was riding, and sustained serious injuries. The cause of the accident was alleged to be the negligence of the defendant in imperfectly constructing the rails and track of the road at Honby, and in allowing this defectively constructed track to remain out of repair, inadequate and unsafe. The answer admitted the ownership by defendant of the road in question, denied that defendant was engaged in the business of operating the road, denied that plaintiff was or ever had been in its employ as a brakeman, or in any other capacity, and denied the imperfect construction and want of repair of the rails and track. The jury returned a general verdict in favor of plaintiff in the sum of \$8,000. It likewise made special findings of fact upon certain interrogatories presented. These findings, with certain other facts, agreed to by counsel under stipulation, may thus be summarized: The defendant was the owner of the railroad upon which the accident complained of occurred, but, prior to the time of the accident it had leased the road and all the rolling stock and property of every kind used upon or in connection with it to the Southern Pacific Company of Kentucky. The Southern Pacific Company was at the time of the accident in the exclusive operation of said railroad under the lease. The side track upon which the accident occurred had been constructed by the Southern Pacific Company as an aid or adjunct to the main line. The plaintiff at the time of the accident was in the employ of the Southern Pacific Company, and not of the Southern Pacific Railroad Company. The trial court determined that a conflict existed between the special findings and the general verdict, and holding that, under the special findings, defendant was entitled to judgment, rendered its decision accordingly.

In all cases where a valid lease is found (or, as in this discussion, where it is assumed), the lessor company owes no duty whatsoever as an employer to the operatives of the lessee company. The claim of the relationship of employer and employee under such circumstances

is a false claim and quantity. It does not exist. The responsibility of the lessor company when it attaches does not spring from this relationship, but arises from a failure of the lessor company to perform its duty to the public, of which public the employee of the operating company may be regarded as one. Thus, in those cases where the injury has resulted to an employee of the operating company by reason of the negligence of a fellow-servant, or of want of skill and care of the lessor company in managing the road, or in negligence in furnishing suitable appliances, these and kindred matters being entirely and exclusively within the control of the lessee company, for injury which may result the lessor is in no way responsible. But where injury has resulted to an employee of the operating company by reason of a failure of the lessor to perform its public duty, as in its failure to construct a safe road, as is here charged, the injured employee may sue the lessor company as one of the public, for its failure to perform that duty, and not because, between himself and the lessor company, the relation of employee and employer, or any relation of contractual privity, exists. The charge against the defendant is that the injury resulted by reason of its imperfect construction and maintenance of the rails and track of its road. The verdict of the jury for plaintiff is its declaration that the charge was substantiated by the evidence, and the nature of the omission or dereliction is such as to entitle the plaintiff to compensation from the defendant herein for injuries which may have resulted to him by reason of it.

As has been indicated, the plaintiff in this case has averred that he was an employee of the defendant corporation. The proofs in this regard disclose that he was in the employ of the Southern Pacific Company. The variance we think to be immaterial. The averment could be eliminated, and a cause of action would still remain. Plaintiff pleaded and showed to the satisfaction of the jury that he was not a trespasser upon the railroad at the time and place where he met with his injury, but that he was there under lawful employment; that, in pursuit of his vocation, he met with an injury occasioned by defendant's defective construction of its road-bed, for which injury the defendant is, in law, responsible. It follows that there is no irreconcilable conflict between the special findings and the general verdict of the jury, and the court should, therefore, have entered judgment for plaintiff. The judgment is reversed and the cause remanded, with instructions to the trial court to enter judgment in favor of plaintiff and appellant, under the general verdict of the jury.

Opinion by HENSHAW, J.

PIERCE v. SOUTHERN PACIFIC COMPANY.

Supreme Court, California, February, 1897.

LOSS OF FRUIT TREES BY CARRIER—Where a carrier shipped a cargo of orange trees over roads and in latitudes which made the destruction of them by frost probable, that fact showed a want of extraordinary care for which defendant was liable.

CONTRACT AGAINST PUBLIC POLICY.—It is contrary to public policy to permit a carrier to stipulate for exemption from the effect of its negligence.

MEASURE OF DAMAGES—LIMITATION IN CONTRACT.—Where goods are carried at a lower rate than the usual freightage, and in the event of loss, the damages are fixed at a certain sum, such a stipulation is valid.

APPEAL from judgment for plaintiff rendered in the Superior Court, St. Bernardino County.

A. B. HOTCHKISS, for appellant.

CHAPMAN & HENDRICKS and CURTIS, OSTER & CURTIS, for respondent.

Appeal by defendant, the Southern Pacific Company, a corporation, from a judgment in favor of plaintiff for \$8,965, interest and costs, and from an order denying its motion for a new trial. In February, 1891, the plaintiff, R. W. Pierce, shipped from Apopka, county of Orange, Fla., by the Florida Midland Railway, two carloads of orange trees, consigned to Gulick Bros., Riverside, Cal. The first carload of trees was shipped February 19, 1891, and was received at New Orleans by the Southern Pacific Company, February 25, 1891. The other carload was shipped February 24, 1891, and was received by the Southern Pacific Company at New Orleans, March 1, 1891. Each carload was shipped under a bill of lading signed by plaintiff, R. W. Pierce, and by the agent of the Florida Midland Railway. A copy of the bills of lading was given to plaintiff. They were upon printed forms, with blanks, filled in with the names of the consignors, etc., in substance as follows: "Marked and consigned to Gulick Bros., Riverside, California, one carload of orange trees, via Southern Pacific, 20,000 weight, car initialed, N. & L. No. —," etc. In the printed form it was provided that "the articles and packages" (contents unknown) were in "their nature perishable, fragile or otherwise susceptible to damage," were shipped at a rate "lower than the regular tariff charges of said railway company and connections," and it was agreed that the shipper should "insure said Florida Midland Railway Company and all lines which said shipment may pass, between points of shipment

and destination, against claims by loss or damage incurred by reason of delay in transportation, or any other cause arising out of responsibility as master over its agents or servants (gross negligence excepted), incident to the shipment," and "that the actual invoice cost at point of shipment will be taken as measure of damages to govern settlement of any damages for which the carriers may be liable," and that "claims for loss, damage, or overcharge arising out of this shipment shall be presented to agents of delivery lines within one week after arrival of the property at its destination." The Southern Pacific had a direct through line of railroad, owned or operated by it, and by others in connection with it, from New Orleans, across Texas, New Mexico and Arizona, via El Paso and Yuma, to Colton, Cal. When the freight reached New Orleans this line was broken by severe storms and washouts in Arizona, and was not likely to be available for the transportation of freight for some time. Under these circumstances, by order of its general agent, the trees in question were sent north through Texas to Denver, Colo., thence to Ogden, Utah, thence over its Central Pacific road, etc., to Colton, Cal., where the cars were delivered to the Southern California Railway, and by it hauled to Riverside, a distance of some six or eight miles, arriving at the latter point March 12 and March 16, respectively, 1891. While in transit by the northern route, the trees were entirely destroyed by freezing.

The contention of defendant that it cannot be held liable for the reasons (a) that the bill of lading described the packages as "contents unknown;" (b) that it was not furnished with the bill of lading, or with an opportunity to inspect the property, so as to inform itself of the character thereof, or its liability to injury,—cannot be maintained. It is true, the printed portion of the bills of lading uses the following expression: "The following articles and packages (contents unknown), marked and consigned as below, to wit (then follows the description in each bill of lading in writing, which is in part as follows): 1 car orange trees." Again, the evidence shows without contradiction that the cars were marked on the outside with the names and residence of the consignees, and "orange trees," marked in big, plain letters. In addition to this, the cars had open ventilators at each end, affording an opportunity to see and examine the contents. Defendant must, therefore, be held to have known the contents of the cars, or, at least, to have had the means of knowledge at hand. "It is the duty of the carrier to transport the goods by the usual direct route, and for any loss which a departure from such route may occasion to them he is liable." Hutch. Carr. sec. 312. It is said, however, that where

there are two or more customary routes, and the carrier is left free to choose between them, he may take his choice without incurring increased liability, if there are no special reasons which make the route chosen unsafe. *Express Co. v. Kountze*, 8 Wall. 342; *Maghee v. Transportation Co.*, 45 N. Y. 514. Judging from the testimony, it can hardly be said that the route by which defendant shipped the goods in this case was one of its customary routes. With a through route of its own through Texas, New Mexico, and Arizona, it sent the goods many hundred miles to the north, over roads operated by other companies, to meet its Central Pacific road at Ogden, in the state of Utah. Conceding, however, that the route was a usual one, there were special reasons for not sending goods which were liable to destruction by frost over this northern route in winter, where defendant might reasonably have expected the result which followed. When, therefore, defendant's through route via Ft. Yuma was obstructed by stress of weather, it became its duty to hold the goods until that or some other safe avenue was opened, or to notify the consignees or consignor, and take their directions in the premises. The evidence shows that they did this with another car of like orange trees at a date a little earlier, and by direction of the consignees shipped them safely through by the Atlantic & Pacific Railroad. Where goods are marked in such a way as to indicate their character, or as to give notice to the carrier that their safety requires that they must be carried in a particular manner, such marks must not be disregarded. *Hutch. Carr. sec. 310*. In view of all the surrounding circumstances, we are of opinion that the defendant, by a failure to adopt one or the other of the foregoing courses, erred in judgment, and became liable to plaintiff for the results which followed. The evidence fails to establish a case of gross or wanton negligence; but still does, we think, show a want of that extraordinary care imposed upon common carriers of goods.

A carrier is not relieved from responsibility under a contract that he shall not be responsible if he has been guilty of negligence. *Railroad Co. v. Pratt*, 22 Wall. 123. It is contrary to public policy to permit the carrier to stipulate for exemption from the effects of the negligence of himself or his servants. *Hutch. Carr. sec. 260*, and cases there cited; *Railroad Co. v. Lockwood*, 17 Wall. 357; *Liverpool & G. W. Steam. Co. v. Phenix Ins. Co.*, 129 U. S. 397, 9 Sup. Ct. 469.

As to the measure of damages. The court below awarded damages up to the full value of the goods at the point of destination, although the uncontradicted evidence tended to show that the value at the shipping point was about one-half of that given. It will be observed

that the contract between the plaintiff and the Florida Midland Railway was for a through shipment of the goods to Riverside. We repeat that portion essential to the matter in hand: "Whereas, said railway company has agreed that the cost of transportation * * * shall not exceed * * * \$1.97 3-4 per 100 lbs., said rates being lower than the regular tariff charges of said railway company and connections; Now, therefore, said shippers, for themselves and consignees, do hereby insure said Florida Railway Company and all lines over which said shipments may pass between points of shipment and destination. * * * It is further agreed that the actual invoice cost at point of shipment will be taken as measure of damages to govern settlement of any damages for which the carriers may be liable." There is a wide distinction between a contract for exemption from liability in case of negligence which is usually held in derogation of public policy because tending to encourage negligence, and a contract fairly made, whereby, in consideration of a lower freightage, the parties agree upon a fixed or determinate value to be placed upon the article to be shipped in case of its loss.

Hutchinson, at sec. 250, after discussing the question of total exemption in case of negligence, adds: "To be distinguished from these cases, however,—though the distinction is not always observed,—are those cases, obviously different, in which, for the purpose of determining the shipper's liability for freight and the carrier's responsibility for damages, the value of the property is agreed upon. When such is the case, the Supreme Court of the United States and many of the State courts hold, to use the language of Mr. Justice Blatchford in *Hart v. Railroad Co.*, 112 U. S. 331, 5 Sup. Ct. 151: 'That where a contract of the kind, signed by the shipper, is fairly made, agreeing on the valuation of the property carried, with the rate of freight based on the condition that the carrier assumes liability only to the extent of the agreed valuation, even in case of loss or damage by the negligence of the carrier, the contract will be upheld as a proper and lawful mode of securing a due proportion between the amount for which the carrier may be responsible and the freight he receives, and of protecting himself against extravagant and fanciful valuation.' " In the same case the learned justice further said: "The limitation as to value has no tendency to exempt from liability for negligence. It does not induce want of care. It exacts from the carrier the measure of care due to the value agreed on. The carrier is bound in that value for negligence. The compensation for carriage is based on that value. The shipper is estopped from saying that the value is greater. The articles have no greater value for the purpose of the contract of

transportation between the parties to that contract. * * * There is no violation of public policy. On the contrary, it would be unjust and unreasonable, and would be repugnant to the soundest principles of fair dealing and of the freedom of contracting, and thus in conflict with public policy, if a shipper should be allowed to reap the benefit of the contract if there is no loss, and to repudiate it in case of loss." We understand full well that there are many cases holding a contrary doctrine to that enunciated in *Hart v. Railroad Co.*, *supra*, but we think that case, which is cited as a leading one, is founded upon reason and justice, and that the trend of judicial opinion is to the doctrine there enunciated. See cases cited in *Hart v. Railroad Co.*, 112 U. S. at p. 342, 5 Sup. Ct. 156. Respondent objects, and urges that, as the trees in question were cultivated by the plaintiff, there was not and could not be any "invoice price." The evident answer is that by the term "invoice price" was meant the cost or value of the property at the shipping point. That it had a fixed value at that point was attested by the evidence. One of the definitions of an invoice is: "A writing made on behalf of an importer, specifying the merchandise imported, and its cost or value." Black, Law Dict. Plaintiff sued upon his special contract, and averred that defendant received the goods thereunder. Defendant averred in its answer "that it duly performed its duty under the contract set out in the complaint." We think the demand for damages from defendant was in due time, and sufficiently specific, in the absence of any demand by defendant of an invoice, to comply with the contract. We think the court erred in overruling the objection of defendant to proof of the market-value of the trees at Riverside instead of confining the inquiry to the cost or value of the trees at the point of shipment in Florida, as per contract, which, with the freight paid, was the true measure of damages. For this error we recommend that the judgment and order appealed from be reversed and a new trial ordered.

Opinion by SEARLS, C.

CITY OF DENVER v. HICKEY (1).

Court of Appeals, Colorado, January, 1897.

SNOW ON SIDEWALK — INJURY TO PERSON.—A city is liable for its failure to keep a sidewalk in proper condition, and a person injured by falling,

1. See, also, *City of Denver v.* of a similar accident, case next reported Human (Col.), an action arising out in this volume.

owing to the slippery state of the sidewalk caused by accumulation of snow, may recover damages therefor.

APPEAL by defendant from judgment rendered for plaintiff in the District Court, Arapahoe County.

F. A. WILLIAMS and G. Q. RICHMOND, for appellant.

FELKER & DAYTON, for appellee.

The personal injury which Bridget Hickey received by falling on a sidewalk in Denver, and the negligence of the city, are the gravamen of this suit. The accident occurred on Sixteenth street, near Arapahoe, in front of the post-office. The sidewalk was laid in 1893, and was what is known as a "cement walk." Its construction and condition were the matters alleged to show negligence. The verdict was against the city, and in this statement the facts which must of necessity be taken as established by the verdict will be narrated without regard to the city's contentions respecting the proof. The surface of the walk was of such a high grade and density of cement that it was exceedingly smooth, resembling, as some witnesses say, "a glazed surface." The contractor indented it, but the indentures were so shallow that they did not sufficiently roughen the surface to make the walk safe for pedestrians. Whenever there was any rain or dampness, or any fall of snow which melted or was so light as not to cover the walk, it was exceedingly difficult for a pedestrian to maintain his equilibrium. A snow storm commenced on February 3, and ceased some time on the 4th. When the appellee was going down town, about 4 or 5 o'clock in the afternoon, and got onto this walk, she slipped, lost her balance, and fell. The result was a Colles fracture at the wrist. No question is made respecting the extent or character of the injury, or the amount of the verdict, and no other or further statement will be made respecting them. The appellee wore rubbers, and, according to her testimony, was using due care while walking. There was evidence which tended to show that on the morning of the 4th the walk was cleaned off by the janitors of the post-office building, in front of which the accident happened; and it is by no means evident that the accident happened by reason of neglect in this particular. There was a good deal of evidence offered which tended to show that the walk was dangerous because of its slippery surface. The evidence tended to prove that it ought to have been more deeply chipped and indented, in order to make it rougher, and avoid the smooth condition which made it unsafe. This work was afterwards done by the city, and seems to have entirely remedied the difficulty.

There were two theories on which the case was tried, and towards which the testimony was directed. On the establishment of either,

the plaintiff could probably recover. Only two propositions are relied on by the city to reverse the judgment. One is based on an alleged inconsistency in the instructions, and the other relates to a defense to which the city seems to attach a good deal of importance, proceeding from the *locus* of the injury, and the rights of the federal government, as they are contended to exist, over the property in front of which the walk was laid.

The particular spot where Mrs. Hickey fell was in front of the post-office building, near the corner of Sixteenth and Arapahoe. The lots extended from the alley, which is midway between Curtis and Arapahoe streets, to Arapahoe, and westward for a specific distance, and were deeded to the federal government for post-office purposes. A building was erected on it. The building and the lots are, of course, under the jurisdiction and control of the federal government. In 1883 (Laws 1883, p. 205), the legislature ceded to the United States jurisdiction over these lots when the government should become the owner of the fee. The city assumes that, because this jurisdiction was granted to the government, its duties with respect to the walks in front of it were in some manner changed, and it was excused from the exercise of the care and the doing of the things which are conceded to be its general duties in other parts of the city. It is insisted that, because the government laid the walk and the city could not control the work, therefore it was absolved from either supervising the construction or remedying any defect in the pavement which resulted from the construction or the character of the surface. It seems to us there are several answers to the contention. In the first place, the complaint charged that the duty rested on the city; that the sidewalk was unsafe, and was at the particular date of the happening of the accident in a dangerous condition, whereby the accident occurred. The answer admits that the city was a municipal corporation, charged with the duty of constructing, maintaining and keeping in repair the sidewalks within the city. It also admitted that the place where the accident happened was Sixteenth street, one of the principal thoroughfares of the city, and one with respect to which the admitted duty existed. The denial simply went to the allegations concerning the condition of the walk, either as a local matter or as the result of construction. Under these circumstances, we do not see how, having raised no issue respecting it, the city is in a position to insist that it was under no obligation to care for the particular sidewalk, and that it was relieved of this duty because of the relations of the federal government to the property in front of which the sidewalk was laid. Being outside of any issue presented by its plea, it was unavailable for the purposes of defense.

Equally inoperative are the objections which the city makes to the instructions. It is conceded at first blush, disregarding the two theories on which the case was tried and the two bases on which the case was laid, it might appear the instructions were inconsistent and inharmonious. It must be admitted the rule has often been expressed that where instructions are inconsistent and inharmonious, and calculated to confuse the jury, an inaccurate instruction having this effect will not be cured by a subsequent one which correctly states the law. Conceding this proposition does not preserve the assignment of error in favor of the appellant. The plaintiff alleged that the walk was defective in its construction, dangerous in its condition, with knowledge to the city, and unsafe and insecure because of its local condition at the time of the happening of the accident. We do not discuss the question of notice, because it is alleged in the complaint, and not denied in the answer. We are therefore permitted to proceed on the hypothesis that the city had full notice with respect to its unsafe and insecure condition, and likewise had notice of its condition as affected by the local situation. Dismissing, then, the question of notice, it brings us to the proposition that the instructions are not open to the criticisms made by the city. We are hardly required to set forth these instructions, and demonstrate their accuracy and sufficiency; but we can decide this appeal, and at the same time effectuate any useful purpose, by the simple suggestion that the instructions charged the jury with reference to the two hypotheses. In other words, the jury were substantially told that if they found from the evidence that the sidewalks were unsafe and insecure, by reason of the method of their construction and the character of the surface, and the accident happened therefrom, they could, granting a verdict in favor of the plaintiff with respect to her injuries, find for her in such sum as, in their judgment, would afford her proper compensation. The jury were likewise told if they found from the evidence that the accident happened because the city failed to keep the walks in proper condition after a storm, and the surface was slippery, insecure, and unsafe by reason of it, and the accident happened because of it, then, in that event, they might likewise find a verdict for the plaintiff. Of course, in stating this law to the jury, the court properly limited it by telling the jury that if the city had not had a reasonable time after the storm to put the sidewalk in proper shape, and if the accident happened shortly or immediately after the storm, then the city would be excused for its failure to put the sidewalk in proper condition. It must be remembered, however, that all these instructions with reference to the effect of a storm on the sidewalk, and the duty of the city as modified by the local

condition, were asked by the city. The plaintiff asked no instruction about it, apparently resting the cases substantially on the theory that the sidewalk was improperly constructed, and in a condition which made it dangerous for the use of its citizens. Under these circumstances, we do not see how the city can complain because these instructions were given, or because of any inconsistency which thereby resulted in the entire charge, nor that it can complain because of the alleged tendency to confuse the jury. If this did result, it was the city's own fault in asking the instructions. As before intimated, we do not see that such was the actual or necessary result of those two classes of instructions. While they were very properly asked by the city, since there was evidence tending to show that, possibly, the accident happened because of the storm, and not because of the defective construction, we are unable to see that they could in any manner have confused or misled the jury. The jury were very fully and aptly instructed in regard to the law; the case was exceedingly plain; and the testimony fully sustains the verdict. As we read the record, the accident happened because of the defective construction, and not because of local conditions, except as those local conditions tended to emphasize the dangers resulting from this defective construction.

Judgment affirmed.

Opinion by BISSELL, J.

CITY OF DENVER v. HUMAN.

Court of Appeals, Colorado, January, 1897.

INJURED ON SIDEWALK — DAMAGES.—Where a person was injured by slipping on a sidewalk, evidence as to inability of the injured person to go to work since the injury, was admissible to prove damages.

APPEAL from judgment rendered for plaintiff in the District Court, Arapahoe County.

F. A. WILLIAMS and G. Q. RICHMOND, for appellant.

GEO. C. NORRIS and W. HENRY SMITH, for appellee.

Mrs. Human brought this suit against the city to recover for an injury which she received in slipping on the sidewalk which was under discussion in the case of *City of Denver v. Hickey*, 47 Pac. Rep. 908 (1).

The only difference between this case and that lies in the fact that

1. See the preceding case reported in this volume.

the city offered the deeds from Tabor to the government, in order to show that title had passed to the United States, whereby the legislation which gave the government jurisdiction over those lots had become effectual. According to the views which we expressed in the Hickey Case, this made no difference, and in no measure tended to alter, lessen, vary, or modify the duties and liability of the city. If there was testimony on which the verdict could stand, the city could not escape responsibility because the title was in the government, or because the federal authorities had laid the walk. It was obligated to see that the walk was properly laid, and the surface in a safe and suitable condition for the traveling public. There is enough evidence in the case to justify the verdict of the jury, and the city cannot, because of the conveyances or the vesting of jurisdiction, escape this responsibility.

There is only one question in this case which at all varies it from the other. There was considerable evidence introduced to show the condition of Mrs. Human's hand and arm before and after the injury. No question is made respecting the admissibility of all this testimony and its relevancy to the issue, except in so far as it may be affected by a single question put to her daughter, who was asked whether her mother had been out to service since the injury. The question was objected to, but its answer, which was in the negative, was admitted. This is the principal and only difficulty suggested by the record. It is possibly on the border line which separates admissible from inadmissible testimony, because of the condition of the pleadings. General damages were alleged, but there was no averment of any special loss sustained by reason of the plaintiff's inability to labor, and the loss of time and wages as the result of this disability. It must be conceded that special damages can only be proved and recovered when they have been laid in the complaint. The only question is whether this rule was violated in permitting the witness to answer this specific question. We do not so understand it. In the first place, evidence had already been given in that direction by the plaintiff; and, if the answer was objectionable, it was not taken advantage of early enough in the case to render the present exception one on which a reversal could be based. We are bound, in considering these appeals, to disregard whatever errors are harmless when substantial justice has been done between the parties, and we might very easily sustain this verdict on that hypothesis. We are well satisfied, however, that this fact was admissible for the purpose of proving the condition of her arm and hand after the happening of the injury. Evidence of the use which the plaintiff was able to make of her arm before and after the accident affords a basis

for the jury's judgment respecting the plaintiff's loss. It is true, in this case the jury were not instructed on this subject; but the defendant failed to ask any instructions respecting it, and we are unable to see that, of necessity, this matter entered into the jury's computation as a matter of damage. As has been said in some cases, evidence of this sort conduces to prove the extent of the plaintiff's injury, and assists the jury in determining the fact that the plaintiff has sustained an injury of no slight character. The legitimacy of this sort of evidence has been recognized by the Supreme Court of the United States, and by learned courts in other jurisdictions. *Wade v. Leroy*, 20 How. 34; 3 Suth. Dam. p. 263, *et seq.* In the present suit the plaintiff did not attempt to show what her earnings had been when she was out at service before the injury, nor what she could probably have earned had she been able to resume her business after the accident happened. This proof, of course, would have been essential had there been any allegations of special damages, and she had sought to enhance her recovery by proof of the value of her loss of time. Since she offered no proof in that direction, we do not see that the general rules respecting the production of testimony to recover for a personal injury were infringed by the particular question put to the witness. The question simply elicited the fact that after the injury she was unable to go out to service, and it may be said to have tended to show the condition in which she was left by reason of the hurt.

Judgment affirmed.

Opinion by BISSELL, J.

TOWN OF KENTLAND v. HAGEN.

Appellate Court, Indiana, February, 1897.

MUNICIPAL CORPORATIONS — DEFECTIVE SIDEWALK. — An incorporated town that permits its streets to remain defective is liable for injuries sustained by a pedestrian in stepping into a hole in the sidewalk.

APPEAL from judgment, Circuit Court, White County, in favor of plaintiff.

CUMMINGS & DARROCK and SELLERS & UHL, for appellant.

REYNOLDS & SELLS and FRANK DAVIS, for appellee.

Appellee brought this action against the town of Kentland for damages for injuries sustained by appellee on account of a defective sidewalk in said town.

Appellant attacks the sufficiency of the complaint solely upon the ground that an incorporated town is not liable in any instance for injuries occurring from defective streets or sidewalks. The Supreme Court of this State has repeatedly held to the contrary and this is not therefore an open question for this court. *Town of Centreville v. Woods*, 57 Ind. 192; *Lowrey v. City of Delphi*, 55 Ind. 250; *Scudder v. Hinshaw*, 134 Ind. 56, 33 N. E. 791. The same doctrine is also adhered to in the well-considered case of *Board v. Allman*, (Ind. Sup.) 42 N. E. 206, where Monks, J., delivered the opinion of the court, quotes with approval the following from the case of *Hollenbeck v. Winnebago Co.*, 95 Ill. 151; "It will be found that the authorities upon which cities and towns as municipal corporations are held liable for the results of negligence of official duties make this distinction: that such municipalities are voluntary corporations, organized for public purposes, and possessing legislative, ministerial and judicial functions, not possessed to the same degree by counties or townships, but, aside from the reasons so stated for the support of the distinction, it is plain to us that counties have no such powers as cities or towns, to ordain in a corporate capacity what improvements shall be made, the free choice of agents to make them, and the discretion as to the rate of the levy to make the same." Upon the facts found by the jury we think the court was right in overruling appellant's motion for judgment upon the verdict and in rendering judgment in favor of appellee upon his motion therefor.

Judgment affirmed.

Opinion by HENLEY, J.

COY v. INDIANAPOLIS GAS COMPANY.

Supreme Court, Indiana, January, 1897.

DUTY OF GAS COMPANY TO FURNISH APPLICANTS.—A natural gas company having a franchise to occupy the streets of a city and to serve the consumers must serve all applicants complying with the rules.

PLEADING—DAMAGES—ACTION FOR DEATH CAUSED BY FAILURE TO SUPPLY GAS FOR HEATING PURPOSES.—Where a complaint states that a natural gas company contracted to furnish fuel gas for plaintiff's house, and that relying on the contract plaintiff made no other arrangement for heat; that defendant failed, although notified, to supply the gas during severe winter weather while plaintiff's child was sick, and that the child died by reason of the low temperature of the house caused by the failure to supply the gas, and that the death was the proximate cause of the breach of contract, it is sufficient and a demurrer thereto was overruled.

APPEAL from judgment, Superior Court, Marion County, in favor of defendant.

SAMUEL ASHBY, for appellant.

MILLER, WINTER & ELAM, for appellee.

The sole error assigned on this appeal is that the court sustained a demurrer to appellant's complaint and to each of its two paragraphs.

The first paragraph alleged the incorporation of the appellee, and of its rights, powers, immunities and franchises in furnishing gas to consumers in the town of Haughville. That, by reason of its rights and franchises a duty was owed to the appellant by the appellee to supply him with gas, and that a contract was entered into to so supply him at an agreed price for fuel. That appellant's family consisted at the time of the agreement of himself, his wife, and two children; one of said children, Lou Ethel Coy, being then of the age of five years. That, in violation of the contract, the appellee refused and neglected to supply the gas and left appellant without fuel with which to heat his dwelling. That appellant, relying on the contract, had failed to procure wood, coal, gas or other fuel. That, during very cold weather in December, 1892, and the first part of January, while appellant was unable to procure any other fuel to heat his house, his child Lou Ethel Coy being sick in the house, and after due notice to appellee of its failure to supply gas to appellant and of his inability to procure fuel elsewhere, the dwelling of appellant became so cold and thoroughly chilled by the want of heat, that the said child, by reason of the failure of appellee to furnish gas, took a relapse and became very ill, and lingered in severe sickness until December 31, 1892 when she died; the extreme sickness and death of said child being the immediate, direct and proximate result of the failure of appellee to supply said gas and of its refusal to discharge its said duty to appellant.

The second paragraph of the complaint is similar to the first, except that it counts on damages for the death in like manner of the other child of appellant.

Counsel differ as to whether the action disclosed in the complaint is one on contract or in tort. It is true, as a general rule, that no one is compelled to do business with any but those with whom he chooses. There are, however, exceptions to this rule. Common carriers, innkeepers and telegraph, telephone, water, gas and other like companies, persons and corporations enjoying public franchises are held to owe a duty to the public as well as to all individuals of that public. *Telephone Co. v. Fehring*, 45 N. E. 64; *Portland Natural Gas and Oil Co. v. State*, 135 Ind. 54, 34 N. E.

818 (1). And that the public grant to appellee imposed also a public duty in return, see, further, the recent case of *Milling Co. v. Mendenhall*, 142 Ind. 538, 41 N. E. 1033, and cases cited.

In the case at bar the arrangements and reasonable conditions referred to in the cases cited were all provided for by the contract between the parties. The agreement so entered into did not in any manner absolve appellee from the duty assumed under its franchise, but rather by its terms fixed the character and scope of the duty so assumed. Nor a partial but a full compliance with the company's duty is required, and this without any discrimination as to persons having a right to the gas. *Telephone Co. v. Fehring*, *supra*. The failure of the duty on the part of the company, as alleged in the complaint, is a tort, even though the complaint also shows a failure to comply with the contract. The failure to perform such a contract is in itself a tort. *Railroad Co. v. Eaton*, 94 Ind. 474; *Railroad Co. v. Acres*, 108 Ind. 548, 9 N. E. 453; *Brown v. Railway Co.*, 54 Wis. 342, 11 N. W. 356, and authorities cited.

The chief objection to the complaint is that the damages sought to be recovered are too remote. Whether the loss to appellant by the sickness and death of his children might be considered as the natural and probable result of a breach of appellee's contract to furnish gas for fuel during the cold weather in the latter part of December, 1892, we need not consider, inasmuch as the action here, as we have seen, is in tort, the contract being but a statement of the reasonable conditions under which appellee was to furnish the gas in discharge of the duty owed by it to appellant. All damages directly traceable to the wrong done and arising without an intervening agency and without fault of the injured person himself, are recoverable in an action for tort. The wrong in such cases is said to be the proximate cause of the injury. In the well-considered case of *Brown v. Railway Co.*, *supra*, the court said: "The general rule is that the party who commits a trespass or other wrongful act is liable for all the direct injury resulting from such act, although such resulting injury could not have been contemplated as a probable result of the act done."

1. It was said in *Williams v. Gas Co.*, 52 Mich. 499, 18 N. W. 236, "when the defendant company made the connection of its service pipes and mains with the pipes and fixtures of the Biddle House it imposed upon itself the duty to supply the house and premises upon reasonable terms and conditions with such amount of gas as the owner or

proprietor might require for its use and pay for so long as the company should exist and do business." See, also, *N. O. Gas-light Co. v. Louisiana Light and Heat Producing and Mfg. Co.*, 115 U. S. 650, 6 Sup. Ct. 252; *Gibbs v. Gas Co.*, 130 U. S. 396, 9 Sup. Ct. 553.

Taking the allegations in the complaint before us as true, the relapse in sickness and the death of appellant's children were the direct consequences of the failure of appellant to supply the fuel necessary to warm his home. Whether independent intervening causes might have brought about the severe sickness and death of the children is a question for the jury, as is also the question whether appellant might, in fact, have procured other fuel in time to have prevented the fatality complained of.

We are satisfied the complaint is sufficient. The judgment is reversed, with instructions to overrule the demurrer to the complaint, and to each paragraph thereof.

Opinion by HOWARD, J.

**HAMMOND, WHITING AND EAST CHICAGO
ELECTRIC RAILWAY COMPANY v.
SPYZEHALSKI.**

Appellate Court, Indiana, February, 1897.

COLLISION BETWEEN TRAIN AND STREET CAR.—In an action for injuries sustained by a passenger in an electric car, in a collision at a railroad crossing, an allegation that the electric car and steam engine approached the crossing in full view of each other, and that neither made any effort to avoid a collision, is sufficient to charge the electric railway company with negligence, and it was not necessary to allege that the statutory signals were given on the steam road.

APPEAL from judgment Circuit Court, Porter County, in favor of plaintiff, in action by Agnes Spyzehalski for injuries.

ALSPAUGH & LAWLER and F. M. BALOCK, for appellant.

MITCHELL & MITCHELL, MILTON B. HOTTELL and HARVEY MORRIS, for appellee.

This action was originally brought by appellee, Agnes Spyzehalski, against the appellant, the Hammond, Whiting and East Chicago Electric Railway Company and the Chicago & Calumet Terminal Railway Company for damages resulting from an injury alleged to have been sustained by reason of the negligence of both the defendant companies, resulting in a collision at a crossing in Lake county, Ind., and by reason of which appellee was injured. At the conclusion of her testimony in the trial of the cause, appellee dismissed the action as against the Chicago & Calumet Railway Company, and trial was continued against appellant. A special verdict was returned

in which appellee's damages were assessed at \$3,000, and judgment in her favor was rendered for that amount.

The appellant claimed that the court erred in overruling the demurrer to the complaint, that it did not state facts sufficient to constitute a cause of action. The complaint, as has been stated, is against both companies. It alleges that said railways cross each other at a point of intersection near Whiting; that the companies have owned and operated said railways for two years last past continually; that on the 28th of October, 1894, appellee was a passenger on a car of appellant run by electricity; that she had paid her fare and defendant had agreed to carry her as such passenger safely, etc.; that while said electric car was being propelled along the railway of the said Hammond, etc. Railway Company, and under its control, towards the railway of the Chicago & Calumet Terminal Railway Company, and in plain view of the tracks of both defendants, at the point of crossing for a half mile each way from the point of crossing, a steam engine of defendant, the Chicago & Calumet Railway Company, approached said crossing on the tracks of the Chicago & Calumet Railway Company, under its management and control, both said car and engine being in full view of each other; that neither of said defendants made any effort to stop or check either the said electric car or steam engine and wholly failed to give any signal of the approach to the crossing of said engine and electric car, but negligently ran said engine and electric car to said point of crossing, reaching the same at the same time; that both defendants knew that said car and engine would reach said crossing at the same time; that as a consequence of said negligence said engine and car collided at said crossing, the car being thrown from the track and turned over, the plaintiff being thrown against the car and on the ground with great violence, by reason of which she sustained great internal and external injuries; that she was at the time pregnant with child; that she was injured about the hips, abdomen, bowels and stomach, and as a consequence of such injuries, she suffered a miscarriage, resulting in the death of her unborn child, etc. Appellant contends that as it is shown by the evidence that the electric railway was located upon a public highway, the complaint should have averred that fact; that while the steam road had, perhaps, the superior right of way, yet it had no right to cross the public highway without giving the statutory signals; that the appellant had the right to rely upon the steam road stopping its cars before reaching the highway unless it had given the proper signals as required by statute; that it should have averred that the appellant was located upon a public highway and that the

steam road had given the proper signals designating its intention to cross the highway; that otherwise it shows no fault upon the part of appellant.

Counsel content themselves with the statement; no authority is cited, no argument made. The complaint avers that neither the steam engine nor electric cars gave any signal of their approach to the crossing; that those in charge of the electric car saw the engine approaching and knew that it would reach the crossing at the same time with the electric car. In the opinion of the court there was due appellee from appellant a degree of care which did not authorize appellant, under the circumstances alleged, to indulge a presumption at the risk of the lives of its passengers. As between the two companies, each would have the right to presume that the other would comply with the law, but the controversy here is not between them. The negligent conduct of the steam railway company could not excuse the negligence of appellant in running its car in the way of the engine. Appellant owed to its passengers, under the circumstances, the highest degree of care. *Prothero v. Railway Co.*, 134 Ind. 431, 33 N. E. 765, and cases cited.

Judgment affirmed.

Opinion by COMSTOCK, C. J.

HUSTON v. CITY OF COUNCIL BLUFFS.

Supreme Court, Iowa, January, 1897.

FALLING ON ICY SIDEWALK.—Where a person fell on a sidewalk, which was uneven on account of snow and ice, the city is liable for damages, if the authorities neglected to remove the ice and snow within a reasonable time after knowledge of the condition, provided the injured person exercised ordinary care in walking on the sidewalk.

QUESTION OF FACT.—Whether defendant had notice of defective condition of sidewalk is a question for the jury.

WEATHER RECORD AS EVIDENCE.—In such a case, the introduction of an official weather record for the period covered by the accident, is admissible.

APPEAL by defendant from judgment rendered for plaintiff in the District Court, Pottawattamie County.

MAYNE & HAZELTON, for appellant.

HARL & McCABE, for appellee.

Appellee, while passing along and over a sidewalk on the north side of Washington avenue, a much-frequented street in the defendant city, slipped and fell upon the pavement, which was covered

with ice and snow, and sustained a severe and complicated fracture of the arm and elbow. The allegation of negligence was as follows: "That many days prior to the 24th day of February, 1894, occurred a fall of snow, which was suffered by the defendant corporation to lie as it fell upon said sidewalk. Later the weather became warm, and the snow, converted into slush, was still permitted to remain upon the walk, and in that condition was frozen hard and smooth. That the walk in question, at and near the point of injury, was so located as to receive, not only the snow that naturally fell in time of storm, but as well received drainage from the ground lying above it, with no means provided for the escape of the water and slush that might come upon it from above; and that the snow in question, converted into water and slush by the thawing referred to in the petition, not only accumulated upon said sidewalk, but there was, as well, a further accumulation, by reason of descent of water and slush from the higher ground, and this was not only permitted to accumulate, which accumulation occurred on the 18th day of February, 1894, but to remain on said walk until after the accident sustained by plaintiff. Plaintiff shows that the walk in question was not built on a flat surface, but was convex, the centre of the walk being two or three inches higher than the sides, and that by reason thereof the ice complained of did not present a flat surface, but stood at an angle; and, yet further, that by reason of the passage of many pedestrians, on the 18th of February and prior, while the snow upon said walk was in form of slush, the same became very irregular and rough in formation, though smooth and glossy upon the surface, rendering passage over it in the highest degree dangerous and difficult, and that on the evening of February 18th the weather suddenly turned cold, freezing said water and slush in said position and manner." At the trial an instruction was given to the effect that where the city authorities, after notice of accumulations of snow and ice upon the sidewalk, or where such knowledge ought to have been known to them in the exercise of due care, neglect to remove such obstruction within a reasonable time, and a person exercising ordinary care was injured, the city is liable. This instruction correctly stated the law (1). See *Adams v. Inhabitants of Chicopee*, 147 Mass. 440, 18 N. E. Rep. 231; *Fitzgerald v. Inhabitants of Woburn*, 109 Mass. 204; *City of Boulder v. Niles* (Colo. Sup.) 12 Pac. Rep. 632; *Todd v. City of Troy*, 61 N. Y. 506; *Hill v. City of Fond du Lac*,

1. *Proburg v. City of Des Moines*, 63 Iowa, 523, 19 N. W. Rep. 340, distinguished.

The case of *Collins v. City of Coun-*

cil Bluffs, 32 Iowa, 324, was cited and followed as being similar to the one at bar.

56 Wis. 242, 14 N. W. Rep. 25; *Stanton v. City of Springfield*, 12 Allen (Mass.) 566. As to whether defendant had notice or knowledge of the defect complained of, that was a question for the jury. The introduction in evidence of the record of the United States weather bureau, taken and kept at Omaha, Neb., during a part of the month of February, 1894, a period covering the accident, was proper, and was both competent and relevant to the issues in the case. *State v. Brady*, 69 N. W. Rep. 290; *People v. Dow*, 64 Mich. 717, 31 N. W. Rep. 597.

Judgment affirmed.

Opinion by DEEMER, J.

KRAMER ET AL. V. CHICAGO, MILWAUKEE AND ST. PAUL RAILWAY COMPANY.

Supreme Court, Iowa, February, 1897.

LIABILITY FOR LOSS OF STOCK, NOT DEPRECIATION IN MARKET PRICE.—A carrier is not liable for loss due to depreciation in the market price of hogs, where the contract stipulates liability only "for loss or damage to stock."

APPEAL from District Court, Clayton County. Plaintiffs shipped from Littleport, Iowa, to parties in Chicago, a carload of hogs, and claim that, by reason of defendant's negligence in failing seasonably to deliver said hogs they have sustained damages, in the depreciation of the market value of said hogs, in the sum of \$18.99. The action was brought before a justice of the peace. It appeared that the hogs were shipped under a written contract, which was made a part of the petition, and which provided "that no claim for loss or damage to stock shall be valid unless presented to the company, in writing, within thirty days after the same shall have occurred." Defendants demurred to the petition, on the ground that the notice of claim was not given according to contract. Demurrer overruled by the justice, and the District Court affirmed the justice's judgment. The cause comes to this court upon certificate of the trial judge, the question for determination being: "Where stock is shipped by a railroad company under a contract containing a stipulation that no claim for loss or damage to stock shall be valid unless presented to the company, in writing, within thirty days after the same shall have occurred, and where the market price or value of such stock is depreciated in consequence of the negligent or wrongful delay of the company in shipping the same, would the failure of

the injured party to present his claim in writing to the company, for his damages, within thirty days after the injury occurred, constitute a bar to his right of action?"

REUBEN NOBLE, for appellant.

J. E. CORLETT, for appellees.

Under the contract, the claim which is required to be presented to the company in writing, within the thirty days, is a claim "for loss or damage to stock." The claim made is for damages arising by reason of depreciation in the market price of hogs,—an entirely different matter. There is no claim that any of the hogs were lost or damaged, but the claim is that, by reason of the neglect of the defendants to seasonably deliver the hogs, they depreciated in price to the damage of plaintiffs. It seems clear that the claim cannot be said to be within the terms of the contract. Loss of hogs, or injury or damage to them, is what the contract, in express words, covers. It does not undertake to cover a case of loss to the shipper from depreciation in the market price of hogs. The question must be answered in the negative.

Affirmed.

Opinion by KINNE, C. J.

CORSON V. COAL HILL COAL COMPANY.

Supreme Court, Iowa, February, 1897.

EMPLOYEE INJURED IN MINE—DUTY OF AGENT—QUESTION FOR JURY.—Where an employee in a coal mine, engaged in making trips on coal cars through the mine entry, was injured through the falling of slate from the roof of the "entry," due to alleged negligence of a person in charge of the mine, it was error to instruct that it was the duty of such person to attend to the safety of the mine, for which neglect defendant was liable, where there was conflicting evidence on the point, as that was for the jury to decide.

APPEAL by defendant from judgment rendered for plaintiff in the District Court, Polk County.

GUERNSEY & BAILY, for appellant.

EARLE & PROUTY, for appellee.

Plaintiff was an employee of the defendant company, which owned a coal mine operated through a slope, instead of a shaft. The coal was brought to the surface through what is known as an "entry," being an opening from the mouth of the mine, sloping downward gradually for about 1,700 feet, to what is known as the "second

parting." The coal was brought up through this entry on cars, by means of a steam engine at the entrance of the mine, the cars being attached to the drum of the engine by a rope. From the second parting other entries extended into the mine, and to rooms in which the coal was mined, and put into cars that were drawn by mules back to the second parting. At this point the cars were coupled together into trains of nine cars each, called "trips." These trips were, by means of the rope and engine, as we have described, taken to the surface through the main entry, along which a track was laid. It was the duty of plaintiff to ride these trips to and from the second parting. In doing so he stood with his left foot on the front end of the car, and his right foot on the rope. His duty, when riding, was to watch and see whether any of the cars got off the track, as they were liable to do because of coal or slack falling from the cars on the track. Electric wires extended along the entry, by means of which he could signal to stop the trip, if necessary. On October 10, 1894, while plaintiff was riding one of the trips, because of slate that had fallen from the roof of the entry, with which the trip collided, he was thrown therefrom, and his leg broken, for the damage of which this action is brought, charging the negligence of one John Hayden, who, it is averred, was in charge of the underground workings of the mine, and under whose supervision plaintiff was at the time. The answer admits that defendant is a copartnership and denies other allegations of the petition. It pleads, with other matters, that, if plaintiff was injured by the negligence of another, it was that of a fellow-servant, in a way that defendant would not be liable therefor. The issues were submitted to a jury that returned a verdict for plaintiff, and from a judgment thereon the defendant appealed.

As we have said, the negligence charged is that of one John Hayden, alleged to have been in charge of the underground workings of the mine; and the particular negligence charged was a failure to properly prop the roof of the entry and keep the same in repair, and that he notified plaintiff that it was not in a dangerous condition. Having also in mind appellant's claim that Hayden was a fellow-servant, for whose negligence defendant would not be liable, we may quote the eighth instruction. It is as follows: "8. You are instructed that there is no question in this case as to the negligence of a fellow-servant, for which the defendant would not be responsible, as it was the duty of the defendant to keep the roof of the entry in question in repair, by the use of ordinary care and skill, and the evidence shows it was the duty of John Hayden to inspect and keep the said roof in repair; and his lack of care, or his negligence,

pertaining to the inspection of said roof and the keeping of it in repair, is and would be the lack of care or negligence of the defendant. "The complaints as to the instructions are several, and in one or more respects, we think, appellant misapprehends the legal import of it. As we understand counsel for appellant, they regard the instruction as giving a rule that the employer must furnish the servant with a safe place in which to work, and they think the correct rule is that the employer must use reasonable care to furnish such a place. The latter we understand to be the rule, and we also understand it to be the rule of the instruction. It is said in the instruction, "It was the duty of the defendant to keep the roof of the entry in question in repair by the use of ordinary care and skill." The instruction also makes the negligence of Hayden the negligence of defendant, and throughout the instructions the liability is made to depend on negligence in failing to keep the roof in repair, and they do not fix an absolute liability for such failure. The liability of the defendant is made to depend, in part, by averment in the petition, on the fact that John Hayden was its agent in such a way that it was his duty to keep the roof in repair and safe for use. The court told the jury that the evidence showed that it was his duty to do so. Appellant urges that the court erred in that statement, and in this we think appellant is correct. The evidence is so in conflict as to make the question one for the jury. If the testimony of the plaintiff stood alone, it might be sufficient, but the other evidence does not leave it so that the court could be permitted to state the conclusion of fact. James Hayden, a brother to John Hayden, was superintendent of the mine, and had charge of the work, inside and out. His testimony is as much against the conclusion that John Hayden had charge of looking after the safety of the entry as plaintiff's is in favor of it, and he was in a position to know the fact. There is nothing in the other evidence on that point to avoid the conflict. It is difficult to present the situation fully, as to the facts, if there is to be another trial, because of the danger of prejudice to result from it. It is quite clear to us that the question as to the character of Hayden's duties should have been left to the jury. Considerable attention, in argument, is given to the rule as to injuries resulting from the negligence of a fellow-servant, and to the statement in the instruction that "there is no question in the case as to the negligence of a fellow-servant." The expression has led to quite an extended argument and citation of authorities as to when the employer and employee, respectively, is charged with a duty or responsibility to look after the safety of the place where work is done. We understand it to have been the view of the court below

that the plaintiff was not charged with a duty to look after the entry in which he was working, and we concur in that view. It is not as if he had been working in one of the rooms where coal was mined and put on the cars, for there the looking after and keeping safe the room was a part of the work assigned to the miner, and is incidental to his work. It is, as has been said, "a place which a servant makes and occupies as a means of doing his work, or which results as an incident of the work." Again it has been said: "An important consideration, often overlooked, is whether the structure, appliance, or instrumentality is one which has been furnished for the work in which the servants are to be engaged, or whether the furnishing and preparation of it is itself part of the work which they are employed to perform." See *Fraser v. Lumber Co.*, 45 Minn. 235, 47 N. W. Rep. 785; *Petaja v. Mining Co.* (Mich.), 66 N. W. Rep. 951. The rule of the instruction applies to a case where a place is furnished for the servant to do his work, and the keeping of the place in repair is not incidental to the work to be performed. In such a case the rule is that the master or employer must furnish a reasonably safe place to work in, and furnish suitable machinery and appliances with which to do the work. *Fink v. Ice Co.*, 84 Iowa, 321, 51 N. W. Rep. 155, and cases there cited; *Haworth v. Manufacturing Co.*, 87 Iowa, 765, 51 N. W. Rep. 68, and 62 N. W. Rep. 325. The rule is of general if not of universal application. The undisputed facts of this case bring it within the latter rule, so far as concerns the duties of the parties. The duties of the plaintiff had no concern with the preparation or looking after the entry. It was the general passageway to and from the mine,—a completed work; a place in which work was to be done in no way connected with its construction or preservation. It was a place for such work as the plaintiff was doing, and furnished by the employer. This holding is not against that in *Fosburg v. Fuel Co.* (Iowa), 61 N. W. Rep. 400. That case was expressly determined on the rule as to the negligence of a fellow-servant. As the work of riding the trip was disconnected from duties as to the roof of the entry in which plaintiff was riding, it was defendant's duty, through a competent person, to look after its safety. The case, as now presented, does not involve a question as to the negligence of a fellow-servant.

Judgment reversed.

Opinion by GRANGER, J.

FULLERTON V. CEDAR RAPIDS AND M. C. RAILWAY COMPANY.

Supreme Court, Iowa, February, 1897.

ANIMALS INJURED ON TRACK — PLEADING — INSTRUCTION.— Where the petition alleged that plaintiff's cows were injured by defendant's negligence in running its car over them on the track, it is error to charge that defendant would be liable if the jury found from the evidence that defendant's employees did not stop the car as soon as they saw the cows on the track, as that was not in issue.

APPEAL from judgment rendered for plaintiff in the District Court, Linn County.

CHARLES A. CLARK, for appellant.

RICHARD A. STUART, for appellee.

The petition alleges that the defendant is engaged in operating a railway between Cedar Rapids and Marion, and was so engaged on May 5, 1894; that on that day it suffered one of its cars to be run at an unusual and reckless rate of speed, and to become unmanageable and beyond the control of the persons in charge of it, thereby causing it to turn over two cows which were owned by the plaintiff; that the defendant, its agents and employees, negligently, wilfully, recklessly, and carelessly ran into, over, and against the cows after they had seen them on the railway tracks, and, through the carelessness, negligence, and recklessness of said agents and employees, allowed the car to run over the cows, and failed to stop it, although they had abundant time and opportunity to do so; that the injury occurred in the evening, and the defendant negligently failed to provide the car with a sufficient headlight; that the acts of the defendant stated were grossly careless and negligent, and caused the death of one of the cows, and an injury to the other, to the damage of the plaintiff in the sum of \$55; and that the injury was not caused by the wilful acts of the plaintiff or his employee. The petition further alleges that on May 7, 1894, the plaintiff served on the defendant notice of the killing of one cow, and on June 12, 1894, notice of the injury to the other; that the notices were in writing, verified by the plaintiff, and claimed damages in the sum of \$55; that the defendant failed to pay the amount claimed. Wherefore judgment for double that amount is demanded. The answer contains a general denial, and a counterclaim for damages in the sum of \$100 to the car, which are alleged to have resulted from the

negligent and unlawful act of the plaintiff in permitting the cows to be at large. The verdict and judgment were for the sum of \$55, besides costs.

The plaintiff has filed a motion to dismiss the appeal on the ground that the amount involved is less than \$100, and the trial judge has not certified any question for our determination. The amount in controversy, as shown by the pleadings, exceeds \$100. The petition demands judgment for twice the amount of damages sustained, on account of the failure of the defendant to pay that amount within thirty days after the notice of it and the claim for payment were served. For some reason the District Court did not permit the jury to return a verdict for more than the actual damages sustained, but we do not understand that the plaintiff had waived his claim to double damages. The fact that he recovered less than \$100 did not make it necessary to procure a certificate from the trial judge in order to give this court jurisdiction of the cause by the service of the notice of appeal. The motion to dismiss is therefore overruled.

The court charged the jury as follows: "If you find from the evidence that the defendant's employees did not stop the said car which caused the accident as soon as they could do so after discovering that the cows were on the track, * * * then you will find for the plaintiff." The defendant complains of that portion of the charge on the ground that it submitted an issue not presented by the pleadings, and we are of the opinion that the objection is well founded. The petition does not aver, in substance or effect, that the defendant or its employees who were operating the car were negligent in failing to discover the cows, but charges that, with knowledge of their presence on the track, the employees negligently and wilfully ran the car against them.

The jury was also charged as follows: "* * * If you find that the car could not be stopped in time to avoid the accident, by reason of the speed with which it was going, then you will find for the plaintiff for the damages which he has proved he sustained." The appellant justly complains of this portion of the charge. It may have been impossible to stop the car in time to avoid the accident, without fault on the part of the defendant. The rate of speed may not have been unreasonable or dangerous, and the car may have been operated at the time with all the care and diligence which could have been reasonably required, and yet it may have been impossible to stop the car in time to avoid the collision. The rate of speed may not have caused the accident. It occurred at night, and the cows may have appeared on the track suddenly, and very near to the car, while it was moving at an ordinary and reasonable

rate of speed, and yet it may not have been possible for the employees in charge of it to prevent its running against the cows.

Judgment reversed.

Opinion by ROBINSON, J.

FERGUSON v. CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COMPANY.

Supreme Court, Iowa, January, 1897.

INJURY TO SWITCHMAN—CONTRIBUTORY NEGLIGENCE.—Where a switchman attempted to jump from the middle of the track upon which an engine was slowly approaching him, to the footboard on the front of the engine, the pilot having been removed, and slipped and fell under the footboard and was dragged thus over a hundred feet, crying out all the time, but not heard by those on the engine, because of the constant ringing of the bell, and who were not aware of his position until a bystander signaled them, when the engine was stopped, he was guilty of contributory negligence, and there was no evidence of negligence on the part of the employees on the engine.

APPEAL from judgment of District Court, Woodbury. County, entered on verdict for plaintiff.

H. H. FIELD and TAYLOR, SHULL and FARNSWORTH, for appellant.
ARGO, McDUFFIE & ARGO, for appellee.

The plaintiff was a switchman in the employ of the defendant. It was his duty to open the switches for a switch engine that had no pilot, but was provided with a foot board and hand-rail in front, and that extended a foot beyond either rail and there was also a foot board in the rear. On the morning of the accident, the switch engine crew was ordered to bring in a train from some distance and the engine started to go through the switches on to the main line. The plaintiff ran towards the side track on which the engine was moving at the rate of from four to six miles an hour, and stepped between the rails some thirty or forty feet from where the engine started, and attempted to jump onto the foot board. In this he failed, and slipped and fell on the track, and the foot board passed over him. As it passed plaintiff caught it and was dragged 167 feet when his right foot was caught by one of the wheels and crushed so badly that it had to be amputated. During the time he was being dragged he continually cried out for the engineer to stop. But the bell was ringing, and all four persons on the engine testified that they heard no outcry and that the engine was stopped as soon as the

signal of a bystander was seen. One witness testified that he was 160 feet from the plaintiff, and distinctly heard his outcries and was attracted by them. *Held*, that the fact that persons at a distance heard the plaintiff's outcry would not justify a finding that those on the engine heard it, and that there was no evidence of negligence of the employees that would render the defendant liable, and that the plaintiff was guilty of contributory negligence.

Reversed.

Opinion by DEEMER, J.

GRIMMELMAN v. UNION PACIFIC RAILWAY COMPANY ET AL.

Supreme Court, Iowa, January, 1897.

FALLING INTO PIT—CONTRIBUTORY NEGLIGENCE FOR JURY.—

Where plaintiff's intestate, an employee in defendant's round-house, was directed to assist other workmen at a turntable, and on his way, it being a dark and stormy night, he fell into a pit which was filled with boiling water, there being no barriers around, but only a red light about five feet away from the pit, the question of contributory negligence was for the jury.

DAMAGES.—Evidence as to the occupation of plaintiff's intestate and his earning capacity, and the rate of wages of bricklayers and plasterers, was properly admitted on the question of damages.

APPEAL from judgment for plaintiff, rendered in the District Court, Pottawattamie County.

WRIGHT and BALDWIN, for appellant.

HARL & McCABE, for appellee.

For some time prior to the time of the accident in question, deceased was in the employ of the Union Pacific Railway Company at its round-house in Council Bluffs, Iowa, in what was known as the "turntable" or "clinker-pit" gang, whose duties were to take ashes from the engines at what was known as the "clinker-pit," run them to the turntable, turn them around, and then run them into the round-house, where they were turned over to the round-house gang. Some months prior to receiving the injuries from which he died, he quit the employ of the company, and went West. He returned from the West about two weeks before the accident, and again entered the employ of the railway company; working at nights, as an engine wiper, in the round-house. The turntable of the railway company is directly south of the round-house. The clinker-pit, to which we have referred, is about 140 feet northwest of the turntable, and from

15 to 20 feet west of the round-house. The main body of the pit was nearly south of the west door to the round-house, and distant about 50 feet. From the west door of the round-house there was a path leading to the turntable, which the employees were accustomed to use in going to and returning from the turntable. A stone sewer extended in a westerly direction from the round-house to Spoon Lake, a body of water about 200 feet distant. Into this sewer both hot and cold water were discharged from the engines, and carried into Spoon Lake. A short time before the accident this sewer had broken near a man-hole at a point near the southwest corner of the round-house, and nearest the turntable; and the railway company had, a few days before plaintiff's intestate received his injuries, commenced to repair the sewer by digging a ditch from the man-hole to Spoon Lake, with the idea of taking up the old sewer pipe and putting in new. The railway company continued to discharge the hot water from its engines into the sewer, and, as it escaped into the earth at the point where the break occurred, it soon caused the earth, which was loose and porous at this point, to give way; and the excavation gradually widened and deepened until on the fateful day it was a hole about eight feet in diameter, and about six or eight feet in depth. At the time when the engines were blown off this hole would become filled with boiling water, which, owing to the character of the soil, would speedily pass away, until replenished by the blowing off of another engine. The company had a gang of men in the round-house, and another, called the "turntable gang," which was required to be about this excavation both day and night. The ditch of which we have spoken ran from the man-hole to Spoon Lake, close to and parallel with the west side of the round-house, and in digging in the dirt was so thrown as to completely fill the space between the round-house and the ditch. On the other side, the dirt was also thrown, but a path from 10 to 20 inches was left between the dirt and the west side of the ditch. Planks were also placed over the clinker-pit to prevent the earth from filling in. The ditch was dug along a path which the men had been accustomed to use in going from the west door of the round-house to the turntable, and, after the work of excavating had been begun, the men followed the path which had been left at the west side of the ditch, and between it and the loose earth. No guards or barriers were erected around this excavation to which we have referred, nor around the hole which had been made by the hot water. Red lights were used, however, as a means of warning. One of these was placed at the man-hole, another near the west door to the round-house, and a third north and west of the round-house. There was a street lamp near the hole, but it

was not lighted on the evening in question. About 9 o'clock in the evening of May 18, 1892, Guinane, the foreman of the turntable gang requested Morton, the foreman in the round-house, to send out a man to help him (Guinane); and Grimmelman was ordered out by his superior, in response to this request. The night was dark, stormy and rainy, and a high wind prevailed. Grimmelman's lantern had been taken from him, a red globe substituted, and it was being used as one of the warning lights near the ditch. He was sent out without a lantern, and had nothing but a torch to light his way, and this was soon extinguished by the wind. When he went out the round-house door, he discovered the turntable gang at the turntable, turning an engine. These he observed by the aid of the lights which they carried. He proceeded towards where they were, and in so doing fell into the hole which we have attempted to describe, which was then filled with boiling hot water. His outcries for help brought two men from the turntable, who pulled him out of the water, carried him to the round-house, and from thence to his home where he subsequently died of his injuries. The negligence charged is-- First, that the defendant failed and neglected to erect suitable guards, barriers, or other like protection, around the hole or excavation; and, second, that it did not properly warn plaintiff's intestate of the danger to be apprehended from the excavation. At the conclusion of the evidence, defendant moved for a verdict. This motion was overruled, and defendant excepted. The case was thereupon submitted to the jury, and it returned a verdict for plaintiff for the sum of \$5,000. Defendant filed a motion for judgment notwithstanding the general verdict, and, subject thereto, a motion in arrest of judgment and for a new trial. These motions were each overruled, and the defendant excepted, and now prosecutes this appeal from the judgment ordered on the verdict.

It is claimed that the court erred in overruling defendant's motion for a verdict. And the grounds of this contention are that the plaintiff's intestate was guilty of such contributory negligence as bars him of recovery. It is said that the deceased knew of the excavation, or that, if he did not, that he should have known of it, for the reason that there was a red light near the hole into which he fell, and a column of smoke arising from it, which was sufficient to give notice to any man of ordinary prudence of the character of the place, but that, instead of avoiding the dangers, he walked into them, heedlessly and recklessly, and that his administrator cannot recover. It is also said that had plaintiff's intestate gone to the clinker-pit, where he was ordered, instead of to the turntable, where the turntable gang was then at work, the accident would not have

occurred. There is no doubt that Grimmelman knew of the ditch, and there is also no question that the warning lights were in position as claimed; but there is no evidence to show that he knew of the excavation, or of its being filled at times with hot water. When he started to assist the turntable gang, he followed the path usually taken, along the side of the ditch, and the jury found specially that he did not know of the excavation and of the hot water therein. The red lights simply warned of danger, not of the character thereof; and, in so far as shown, the only knowledge that Grimmelman had of its character was that there was a ditch there which had been excavated for some purpose. The lights tended to show that the danger to be apprehended was from a ditch. They did not, of themselves, indicate that at one part of it there was a large hole filled at times, at least, with hot water. Grimmelman, since his return from the West, had been working at nights in the round-house, and did not know of the break in the sewer. He had never, prior to the accident, been near the hole into which he fell; and we do not think it should be said, as a matter of law, that he was guilty of negligence. His employment was in the round-house. Pursuant to the orders of his superior, he left this for another work, which, on account of the condition of the place he was required, or at least permitted to pass, was more dangerous than the one for which he was employed. He took the course therefore he was accustomed to take when at work with the turntable gang, and, without knowledge of the dangers, ran into the hole. It is said that the escaping steam from this excavation was sufficient to give them notice of the dangers. No one testifies, however, that this escaping steam could be seen at night, and there is no reason for saying that it could be seen on this particular night. It is also argued that Grimmelman must have seen the steam in the daytime, while he was working around the round-house. This is a bare inference, and does not necessarily follow from the facts disclosed. It seems that steam arose from it in the daytime only when there was hot water in the excavation; that the water soon passed away, and the steam was no longer visible. It affirmatively appears that Grimmelman was not near this excavation at any time after it had been made, and that, as his duties called him there at night, he had very little knowledge of what daylight would reveal. The deceased had the right to assume that he would not be called to a more dangerous employment than that in which he was engaged, and to meet dangers of which he was not aware, without notice being given thereof. The only danger he knew of was from the open ditch, and, if this had been all there was, the accident in question would not have happened. It does not appear

what light the lantern at the man-hole gave, and we cannot assume that it was sufficient to disclose the dangers lurking in that hole. Defendant also contends that Grimmelman was guilty in that he did not go directly to the clinker-pit, instead of to the turntable. Had he done this, and crossed over the ditch on the planks which spanned it near the round-house door, the accident would not have happened. The difficulty with this contention is that the men he was ordered to assist were at the turntable when he left the round-house, and he proceeded directly to where they were, instead of going to the clinker-pit, where he was to work. This he did, as we must assume, without knowing of the dangers besetting the path which he selected, and we do not think it follows, as a matter of law, that he was guilty of contributory negligence in taking the course he did. The request made of the round-house foreman was that he send a man out to help the turntable gang. Their work was at the turntable and the pit, and Grimmelman was justified in going to the turntable, under the circumstances disclosed. While the question is not free from doubt, yet we are constrained to hold that the question of contributory negligence was properly submitted to the jury.

Appellee was permitted to prove that his intestate had been an apprentice at the plasterers' and bricklayers' trade for two or three years before he went to work for the railway company, and, while he had not fully learned the plastering business, yet that he could do a good day's work at it. He was also permitted to show that the average wages paid to plasterers at the time of Grimmelman's death was four dollars per day. Appellant assigns errors on these rulings. We think they were correct. See *Rayburn v. Railway Co.*, 74 Iowa, 643, 35 N. W. Rep. 606, and 38 N. W. Rep. 520.

It is said that the special findings are inconsistent with the general verdict, and that judgment should have been ordered for defendant on the special findings. The argument proceeds on the theory that plaintiff's intestate knew of the excavation and the dangers incident to passing it, or that, if he did not know, he ought to have known, had he exercised ordinary care and prudence for his safety. The jury specially found, in answer to the twentieth interrogatory, that he did not know of the excavation, and that it was filled with hot water. It is also argued that the twentieth interrogatory was erroneously submitted, because it is vague, indefinite and misleading. While the interrogatory may be construed to contain two questions, either of which might be answered by "Yes" or "No," yet we think it was not misleading, and that the jury fully understood its import when returning their answer thereto. The answers returned to the other interrogatories clearly indicate that they

proceeded carefully and intelligently in arriving at their conclusions, and that, in answering the one in question, they intended to say that Grimmelman had no knowledge of either the excavation or of the hot water therein. The fact that the question was involved, or that it called for two answers, was not made a ground of objection. It also appears that many of the interrogatories submitted by the defendant were in the same form,—noticeably the fourth. But if it should be held that the interrogatory was faulty in form, its submission would not be a ground for disturbing the verdict. The result would be the same without this answer thereto as with it. The interrogatories submitted by the defendant did not cover the whole case. They did not go to the knowledge of Grimmelman of the excavation which caused his death, and of the danger incident to passing the same.

Judgment affirmed.

Opinion by DEEMER, J.

CHICAGO, ROCK ISLAND AND PACIFIC RAILWAY COMPANY v. MILLS.

Supreme Court, Kansas, February, 1897.

RIGHT OF ACTION BY WIDOW OF A PERSON WRONGFULLY KILLED BY RAILROAD.—The widow of a non-resident who was killed by the negligent act of the railroad company is entitled to sue in such capacity, but not as administratrix.

ERROR from District Court, Doniphan County, where judgment was rendered for plaintiff.

M. A. Low and W. F. EVANS, for plaintiff in error.

JOHN DONIPHAN and A. PERRY for defendant in error.

The issue in this appeal turned on the point as to the right of action of the defendant in error. Laura A. Mills sued the Chicago, Rock Island and Pacific Railway Company, under section 422 of the Civil Code, for damages resulting from the death of Edward R. Mills, in Doniphan county, this State, caused by the negligent operation of the defendant's trains. She entitled the case in her name as "Administratrix of the Estate of Edward R. Mills," but in the body of her petition she described herself as the widow of said Mills, and also as administratrix of his estate, under letters of administration issued by the Probate Court of Buchanan county, Mo.; and she averred also that "by virtue of such letters she claims the right to

recover for the death of her late husband, Edward R. Mills;" and, after setting forth the facts constituting her claim of negligence, concluded with the averment that "by reason of all which she was greatly injured and damaged in the loss of her husband, and of his services, which were her only means of support." The defendant, in its answer, among other matters of defense, denied that plaintiff was the widow of the deceased, Edward R. Mills, but upon the trial of the case, as evidence upon plaintiff's behalf, admitted that she was his widow; and the jury, in answer to a special interrogatory submitted to it, found such to be the fact. Upon the trial of the case it was proved that the residence of the deceased, Edward R. Mills, was, at the time of his death, in the State of Missouri, and that the plaintiff was likewise a resident of such State. The statutes of Missouri which were offered and received in evidence showed upon inspection that in such State actions for damages resulting from death caused by the negligence of railroad officers or employees are limited in the first instance to the husband or wife of the deceased, where such relation exists; wherefore it is argued, following the decision of this court in *Limekiller v. Railroad Co.*, 33 Kan. 83, 5 Pac. Rep. 401, that Mrs. Mills, being the administratrix of her deceased husband's estate, holding appointment as such under the laws of another State, cannot maintain this action in her capacity as administratrix, the law of the State whence she derives her authority giving such right of action to her in her capacity as widow only, and not in her capacity as administratrix. To this the defendant in error, as a principal argument, replies that it was incumbent on plaintiff in error (defendant below) to specially plead the Missouri statutes showing the right of action to be in the widow as such, and not in the administratrix, and, failing to do so, the courts here must presume such statutes to be the same as ours, which give a right of action to the administratrix; and the reply brief of plaintiff in error is wholly devoted to an argument in denial of these positions. The defendant in error makes the additional point that the widow, Mrs. Mills, is entitled to recover as such, notwithstanding she appears in her petition to limit her right of action to her representative character of administratrix. This view appears to us to be sound. It is true, she entitles the case in her capacity as administratrix, but she likewise alleges herself to be the widow of the deceased, and the defendant below makes such allegation an issuable point in the case by filing a special denial thereto. Evidence in support of the allegation was offered, and received without objection. The truth of the claim of widowhood was admitted on the trial by the defendant below, and the jury, in answer to a special interrogatory, found the

plaintiff below to be the widow of the deceased. It is true, the plaintiff, after reciting the fact of her appointment as administratrix, and the issuance to her of letters of administration, declares that "by virtue of such letters she claims the right to recover for the death of her late husband;" but she is not to be concluded by such declaration, and limited because thereof to a recovery in her representative capacity, where the other allegations of her petition so plainly show a right to recover in her character of widow, and where the defendant has not been misled or taken by surprise as to the claim of widowhood, but, on the contrary, has treated such claim as raising a meritorious issue in the case. Under such circumstances, the averment by the plaintiff of her appointment as administratrix, and her right to recover as such, will be treated as surplusage, and judgment will be accorded to her in her individual capacity. To this effect are the authorities. *Litchfield v. Flint*, 104 N. Y. 543; 11 N. E. Rep. 58; *Waldsmith's Heirs v. Waldsmith's Adm'rs*, 2 Ohio, 156.

The case of *Limekiller v. Railroad Co.*, *supra*, which constitutes the basis of the contention of plaintiff in error, is in no wise at variance with the views herein expressed. There was nothing in that case, as there is in this, to give countenance to a claim of recovery as widow or next of kin to deceased. The claim of recovery in that case was as administratrix, under appointment by the Probate Court of a county in Missouri. It being shown that the action could not be maintained in the courts of that State in such representative capacity, it was held that it could not be maintainable here in such capacity.

Judgment affirmed.

Opinion by DOSTER, J.

WESTERN UNION TELEGRAPH COMPANY v. EUBANK ET AL.

Court of Appeals, Kentucky, February, 1897.

TELEGRAM — NEGLIGENT DELIVERY — DAMAGES. — Where plaintiff was injured to a certain amount in value of mules, due to negligent delivery of a telegraphic message by defendants, the damages sustained were not speculative or remote, and plaintiff was entitled to recover.

CONTRACT AGAINST PUBLIC POLICY. — Stipulations in a contract between a telegraph company and the sender of a telegram that the company should not be held responsible for mistakes unless the telegram was

repeated, and that a claim for damages must be presented within 60 days of the happening of the delay or mistake, and exempting the company from damage in the negligent transmission of cipher messages are against public policy and invalid.

APPEAL by the Western Union Telegraph Co. from judgment for plaintiffs rendered in the Circuit Court, Simpson County.

RICHARDS, BASKIN & RONALD, A. S. WALKER, GEORGE C. HARRIS and GEORGE H. FEARONS, for appellant.

GOODNIGHT & ROARK and SIMS & COVINGTON, for appellees.

It is substantially alleged in the petition: That appellees were partners in the live-stock business, and that appellant was a common carrier of messages and telegrams. That on December 21, 1893, plaintiff's agent, H. P. Russell, at Atlanta, Ga., delivered to defendant, to be transmitted to plaintiffs, at Franklin, Ky., the following telegram or message, viz.: "Atlanta, Ga., Dec. 21st, 1893. J. W. Russell, Franklin, Ky.: Ship to-day eighty five dollar load, will make money, feeling good. H. P. Russell,"—for which message defendant received pay, and undertook and agreed to transmit same to plaintiffs, at Franklin, Ky. That the same was received by defendant, at Atlanta, in ample time to be transmitted to plaintiffs in ample time for them to have shipped the carload of mules on that day to Atlanta, but said message or telegram was not delivered to plaintiffs until too late to ship said mules. That it was not delivered to plaintiffs until after dark, about 7 o'clock, when it could have been delivered early in the morning on said day, and it could have easily been delivered in time for plaintiffs to have shipped said carload of mules on that day; but defendant, through the negligence and incompetency of its agents, employees, and operators, then in its employment, and in charge of and operating its line and business, failed to discover said message until about 7 o'clock, and after dark, of said day. That said failure to deliver the message in time was caused alone by the negligence and incompetency of defendant's agents and employees. That, if they had received said telegram at the time it should have been delivered, they could and would have shipped said carload of mules, 25 in number, to Atlanta, Ga., and said mules would have arrived in Atlanta, Ga., at a time when the market was high and good. That they could and would have sold said carload of mules, if same had been shipped on day telegraphed for, for \$250 more than they could and did sell them for when shipped later. That, if said mules had been shipped on December 21, they would have arrived in Atlanta on December 23, 1893, when the market was good, and when they could and would have sold said mules for a good price; but, by the negligence of defendant's agents and

employees, they were thus prevented from shipping, and said mules did not get to Atlanta until the following Tuesday, when the market had declined. That they have been damaged by defendant's negligence in the sum of \$250, for which sum judgment was prayed. The first paragraph of the answer may be taken as a denial of all the averments contained in the petition, including a denial of the charge that appellant was a common carrier; but it does not deny that it is a corporation engaged in transmitting messages, and that it can sue and be sued. It is averred in the second paragraph that appellant received of H. P. Russell individually, not as agent for plaintiff, at 1 o'clock and 5 minutes, December 21, 1893, the message heretofore copied, except the word "the" before "eighty," and filed the original message, marked "A." It is further averred: That in receiving and transmitting messages, with the best of operators, and under the most favorable circumstances, there is always some liability and probability of mistake, and especially as in this case, when the message had to be transmitted several hundred miles, and through relay offices. That mistakes and delays are inseparable from the nature of the business. That H. P. Russell, when he delivered the said message to the defendant to be sent as aforesaid, requested defendant to send said message subject to the terms on the back thereof, which he then agreed to; and he was directed, on the fact of said message, to "read the notice and agreement on the back." (1) It

1. The following is the contract printed on the back of the telegraph blank:—"All messages taken by this company are subject to the following terms: To guard against mistakes or delays, the sender of a message should order it repeated; that is, telegraph back to the originating office for comparison. For this, one-half the regular rate is charged in addition. It is agreed between the sender of the following message and this company that said company shall not be liable for mistakes or delays in the transmission or delivery, or for non-delivery, of any unrepeatd message, beyond the amount received for sending the same; nor for any mistake or delay in the transmission or delivery, or for non-delivery, of any repeated message, beyond fifty times the sum received for sending the same, unless specially insured; nor in any case for delays

arising from unavoidable interruptions in the working of its lines, or for errors in cipher or obscure messages. And this company is hereby made the agent of the sender, without liability, to forward any message over the lines of any other company, when necessary to reach its destination. Correctness in the transmission of a message to any point on the lines of this company can be insured by contract in writing, stating agreed amount of risk, and payment of premium thereon at the following rate, in addition to the usual charge for repeated messages, viz.: one per cent. for any distance not exceeding one thousand miles, and two per cent. for any greater distance. No employee of the company is authorized to vary the foregoing. No responsibility regarding messages attaches to this company until the same are presented and accepted at

was alleged that the contract was legible and plain, and, so far as it could apply to the sending of the message, was agreed to by H. P. Russell, and that he did not request that the message be repeated, but assumed the risk of mistake and delay, and paid only 58 cents for the transmission, which was the usual charge for such messages not repeated. It is further alleged: That no claim in writing had ever been presented to defendant for damages, unless this suit be so considered. The suit was filed more than 60 days after the filing of the message. That the message, by some mistake, was received at the Franklin office, as to J. A. Russell, at 2:05 P. M., and was immediately sent out by the messenger boy to be delivered to J. A. Russell, but he could not be found, and about 6 P. M., on the suggestion of some one acquainted with the people of Franklin, the message was delivered to J. W. Russell. It is also alleged: That when J. W. Russell received the message he received notice of the contract as before set out. And all the foregoing facts are pleaded in bar of plaintiff's claim. But appellant admits that plaintiffs, or at least J. W. Russell, is entitled to 58 cents. That getting the word "J. A." instead of "J. W." Russell caused the delay in the delivery of the message. In appellant's amended answer it alleged that, if the message had been promptly delivered, appellees could not have shipped the mules on that day; that they had no mules in or near Franklin on that day, but did get the message in time to have shipped the mules on the next day. Appellee's reply may be considered a denial of all the averments in the answer and amended answer, and it is also alleged that appellant had at Franklin an incompetent agent on that day; that he was merely a "cub," and unacquainted with the local business of appellant. Appellees also denied that H. P. Russell ever agreed to the stipulation on the back of the message, and also alleged that the same was null and void, and against public policy. The reply was traversed by appellant. Appellees were permitted to amend their reply, and in the reply a waiver of the 60-days' notice was pleaded, and the said plea was traversed by appellant. A trial resulted in verdict and judgment in appellees' favor for \$125.

There was sufficient evidence to justify the verdict and it was

one of its transmitting offices; and, if a message is sent to such office by one of the company's messengers, he acts for that purpose as the agent of the sender. Messages will be delivered free within the established free-delivery limits of the territorial office. For delivery at a greater distance, a

special charge will be made, to cover the cost of such delivery. The company will not be liable for damages or statutory penalties in any case where the claim is not presented in writing within sixty days after the message is filed with the company for transmission."

according to law. The damages claimed were not remote or speculative, in a legal sense. The stipulation as to repeating the message in order to claim damages is against public policy and therefore invalid. Citing *Smith v. Western Union Telegraph Co.*, 84 Ky. 104. It is often of the utmost importance to the sender or receiver of messages that the same should be in cipher or obscure, because, if sent in plain language, the contents would often become known, and the object in view defeated. Hence public policy forbids that appellant should by any contract exempt itself from the damage resulting from its negligence in transmitting such messages. It is the province of the law-making power to prescribe the limit in which an action may be brought. Hence the limitation of 60 days, if not an attempt to vary the statute of limitations, would, if enforced, have that effect; and in this case the requirement that the demand should be made in writing within 60 days, as before stated, is clearly unreasonable and contrary to public policy, and violative of section 196 of the Constitution. A contract that notice or demand of a claim for damages should be given in a reasonable time, and, if not given, that fact to be taken as *prima facie* evidence of the invalidity of the claim, might be upheld.

The real question in this case is as to the negligence of the appellant, and, if the injury was caused by the negligence of appellant, no contract or agreement can bar a recovery. Appellant contends that section 199 of the State Constitution could make telegraph companies common carriers. It is not necessary to discuss the question of fact as to whether said section did, in fact, cause such companies to become common carriers; for it is evident that by the provisions of said section they are to be treated as such carriers, and, therefore, come within, and are bound by, the provisions of section 196, which provides that no common carrier shall be permitted to contract for relief from its common-law liability. Nor is that section of the Constitution in conflict with the interstate commerce clause of the Constitution. A fuller discussion of this section may be found in *Railway Co. v. Tabor*, (Ky.) 36 S. W. Rep. 18. The general rule is that the law of the place where the contract is to be performed governs, subject of course, to the rule that a contract which is void by the law of the place where made is void everywhere. Story, *Conf. Laws*, § 243; 7 *Lawson, Rights, Rem. & Prac.* § 3873. The proof in this case as to negligence was sufficient to sustain the verdict.

Judgment affirmed.

Opinion by GUFFY, J.

LOUISVILLE AND NASHVILLE RAILROAD COMPANY v. KELLY, ADM'X.

Court of Appeals, Kentucky, January, 1897.

RIGHT OF ACTION—STATUTE.—An action may be maintained, under section 241 of the State Constitution, by a widow in her own name for wilful negligence, causing the death of her husband.

DAMAGES—COMPENSATORY AND EXEMPLARY.—The State Constitution, § 241, gives the right to both compensatory and exemplary damages in actions to recover for wilful negligence causing the death of a person, and an instruction to that effect is proper where a person is killed by the negligence of a railroad company.

EMPLOYEE KILLED IN COLLISION—DAMAGES.—A verdict for \$12,500, not excessive where an employee, a young man, was killed in a railroad collision, even if the jury had been limited to giving compensatory damages for the loss of the deceased's power to earn money.

EVIDENCE.—There was no error in refusing to permit evidence as to an organization of employees which might object to the discharge of an employee, nor evidence as to the competency of the engineer and conductor, as the right of action was based on the negligence of the persons in charge of the train.

LIFE TABLES—EVIDENCE.—The introduction of Wigglesworth's Life Tables to show the probable duration of life was competent evidence.

APPEAL from judgment rendered for plaintiff in the Circuit Court, Jefferson County.

LYTTLETON COOKE, for appellant.

MATT O'DOHERTY and R. C. DAVIS, for appellee.

The appellee, Mary Kelly, sought to recover of appellant \$30,000, on account of the loss of the life of her husband and intestate, James Kelly, who was an express messenger on one of the appellant's trains. Appellee alleged in her petition that James Kelly was an employee in the service of the Adams Express Company, and while in the service of said company, and traveling in a car belonging to it, forming a part of a certain train which was being run and operated by the appellant over the lines of its railroad, the defendant, its agents and servants, did, by and through their gross negligence and wrongful acts, cause said train to collide with another of said defendant's trains on its line of railroad, with great force and violence, whereby, through the gross negligence and wrongful acts of defendant and its said agents and servants, the life of said James Kelly was then lost and destroyed, to the appellee's damage in the sum of

\$30,000. The jury, upon the instructions of the trial court, returned a verdict against appellant for \$12,500, upon which judgment was entered.

The accident occurred on September 28, 1893, after the adoption of the new Constitution, but before the adoption of section 6 of chapter 1 of the Kentucky Statutes. No common-law action survived to the personal representative of the deceased. *Givens v. Railway Co.*, 89 Ky. 234, 12 S. W. Rep. 257. The only law under which this action could be maintained was, therefore, to be found in section 241 of the present Constitution, and sections 1 and 3 of chapter 57 of the General Statutes (1). These sections have been held not to be repealed by section 241 of the Constitution in so far as the right of the widow to bring an action in her own name for wilful negligence, causing the death of her husband, was concerned (*Edmondson v. Railroad Co.* [Ky.], 28 S. W. Rep. 789), and in so far as concerned the right of the widow and children of the deceased to the share of the recovery given them by chapter 57 of the General Statutes. *Wright v. Woods' Adm'r* (Ky.) 27 S. W. Rep. 979. But the petition in this case was evidently drawn, and so conceded by counsel, under section 241 of the new Constitution, and it will be considered from that standpoint. It will, therefore, be unnecessary to consider the question whether, by the denial in the answer of wilful negligence on the part of the appellant, the defective

1. Section 241 of the present Constitution, is as follows: "Whenever the death of a person shall result from any injury inflicted by negligence or wrongful acts, then, in every such case, damages may be recovered for such death, from the corporations and persons so causing the same. Until otherwise provided by law, the action to recover such damages shall in all cases be prosecuted by the personal representative of the deceased person. The general assembly may provide how the recovery shall go, and to whom belong; and until such provision is made, the same shall form part of the personal estate of the deceased person."

Sections 1 and 3 of chapter 57 of the General Statutes are as follows:

"Section 1. If the life of any person not in the employment of a railroad company shall be lost in this commonwealth by reason of the negligence or

carelessness of the proprietor or proprietors of any railroad, or by the unfitness, or negligence, or carelessness of their servants or agents, the personal representative of the person whose life is so lost, may institute suit and recover damages in the same manner that the person himself might have done for an injury where death did not ensue."

"Section 3. If the life of any person or persons is lost or destroyed by the wilful neglect of another person or persons, company or companies, corporation or corporations, their agents or servants, then the widow, heir, or personal representative of the deceased, shall have the right to sue such person or persons, company or companies, corporation or corporations, and recover punitive damages for the loss or destruction of the life aforesaid."

averments of the petition, supposing it to have been drawn under section 3 of chapter 57 of the General Statutes, were cured, and an issue made under that section upon the question of wilful negligence.

It is very earnestly and with great ingenuity contended by counsel for appellant that section 241 provides merely for compensatory damages, and that it was error to instruct the jury that they might give exemplary damages if they found appellant had been guilty of gross neglect. This contention is based upon a construction of the language "damages may be recovered for such death," limiting the word "damages" to pure compensation; and appellant relies very much upon various definitions which he cites of the word "damages." These definitions do not, however, fully sustain his contention, for in many of them no rule is given for the estimation of damages, and in several of them the idea is expressed of satisfaction for a wrong or injury. Worcester defines the word as "the indemnity or pecuniary satisfaction awarded for an injury." Definitions of this class would clearly include all kinds of damages which might be awarded for an injury, and we think, as used in section 241 of the Constitution, the word is used in its broadest sense, and includes all varieties of damages known to the law. No limitation is put upon it so far as we have been able to find in any other part of the Constitution. In other words, we are of opinion that the convention intended to extend the common-law right of action to recover both compensatory and exemplary damages for injuries not resulting in death to cases in which death ensued; and a very forcible argument in favor of this construction is found in section 54 of the Constitution, where it is provided that "the general assembly shall have no power to limit the amount to be recovered for injuries resulting in death, or for injuries to person or property." It seems evident that this denial of power to the legislature to limit the amount of recovery would hardly have been inserted if the intent of section 241 was to place a limit upon the amount of recovery. It is well settled in this State that, for injuries not resulting in death, exemplary damages could be recovered where the negligence causing the injury was gross (citing *Railroad Co. v. Case's Adm'r*, 9 Bush. 737). Appellant's contention is, to some extent, based upon the theory that what are called "exemplary damages" are not awarded as compensation to the injured party, but as a punishment to the wrongdoer. This court, in the case of *Chiles v. Drake*, 2 Metc. (Ky.) 146, decided otherwise. The contention was there made that as, under the Constitution, no one could be punished twice for the same offense, only compensatory damages could be recovered where the act causing the injury was also punishable under the penal law. It is further

argued that the general assembly, when, in pursuance of section 241, it adopted section 6 of chapter 1 of the Kentucky Statutes, gave a legislative construction of that section of the Constitution by inserting in section 6 the words: "And, when the act is willful or the negligence is gross, punitive damages may be recovered." The act was passed in pursuance of the constitutional provision, and we do not think the legislature thereby intended to do anything except declare the meaning of the constitutional provision, and make provision, as permitted by that section, as to how the recovery should go, and to whom it should belong.

The instructions given to the jury were as follows: "It will be your duty in this case to find for the plaintiff in such sum as you may believe from the evidence will reasonably and fairly compensate the estate of James Kelly for the destruction of the power of James Kelly to earn money; and if you shall find from the evidence that the death of James Kelly was caused by the gross negligence of the defendant, its agents or employees, then you may, in your discretion, find in favor of the plaintiff such a further sum as punitive or exemplary damages as you may believe from all the evidence that you have heard in the case is right and proper, not exceeding, however, in all, the sum of thirty thousand dollars, the amount claimed in the petition." By gross negligence is meant the failure to observe slight care. It is urged that the instructions were erroneous in fixing compensatory damages to be recovered by appellee, in that the jury was instructed to award such sum as would reasonably and fairly compensate the estate of James Kelly for the destruction of the power of James Kelly to earn money, and in that this instruction commanded the jury to take, as the measure of damages, the gross annual earnings of the intestate for the full period of his expectation of life. We do not think this objection well taken. The jury were instructed to compensate his estate for the destruction of his power to earn money, under all the evidence in the case. This would have authorized them, had they assumed that appellee's intestate would remain during the balance of his life in the same employment, and at no higher wages than he was then receiving, to deduct from the gross earnings during his life expectancy such expenses as he might incur when absent from home and his living expenses; but we do not think that the jury were required to assume that a young man of twenty-eight, in excellent health, would necessarily have no increase at any time during his life in his earning capacity. It has been recently held by this court that the rule contended for by appellant was not the law in Kentucky. In the case of *Railroad Co. v. Lang's Adm'r* (Ky.) 38 S. W. Rep. 503, it was contended that the

jury should have been instructed to award the probable net earnings of the deceased, to be ascertained by deducting from the gross amount the cost of his living. Said the court in that case: "This measure of damages has been adopted by some of the courts of this country, but has never been followed by this court. The loss sustained is the power of the intestate to earn money, etc.; and, if the rule contended for is sustained, then it follows that the representative of one who has been wrongfully or negligently killed can recover no compensation if his necessary or reasonable expenditures exceed his earnings, and the value of human life made to depend upon the money the injured party could have made. One so young as not to be able to labor could recover nothing if, as contended by the appellant, his ability, or rather power, to earn money at the time of his death, is alone to be considered. This young man, at the time of the accident, was eighteen years of age, earning as much as one dollar per day, with, according to the mortality tables, the probability of living many years; and it is the earning power of the deceased, extended to the probable duration of his life, that is the measure of damages. This court has always approved instructions as to the measure of damages that authorized the jury to consider the age of the intestate, his capacity to earn money, and the probable duration of his life. The entire question, without any other specific instruction on the subject of the power to earn money, was left to the jury, with results that are less harmful to the wrongdoer, and we think more satisfactory to the court than the rule contended for by learned counsel. While the question as to the measure of damages has been often made before this court, there is only one case (outside of the general instruction as to compensation) in which it has been decided, and that is *Railroad Co. v. Morris' Adm'r* (Ky.) 20 S. W. Rep. 539. The court there declined to require the jury to deduct the living expenses of the deceased, as it would be embarking upon a sea of speculation almost without limit. We are not disposed to modify or vary the rule in regard to the measure of damages so long adopted by this court, and must, therefore, affirm the judgment." Nor do we think, even if the jury had, by the instructions, been limited to the giving of compensation for the destruction of Kelly's power to earn money, that the verdict in this case would necessarily be set aside as excessive.

A further contention on behalf of appellant is that the trial court erred, greatly to the prejudice of the appellant, in refusing to permit it to introduce evidence to show the fact that the conductor and engineer through whose forgetfulness the accident occurred, were members of certain orders and brotherhoods of conductors and

engineers, and that if appellant had undertaken to discharge either of them from its employ previous to the accident, without being able to show that they were incompetent or unfit for their positions, it would have led to a strike of the trainmen in its service, and inflicted damage upon appellant and upon the public at large. We see no error in the exclusion of this testimony, nor in the exclusion of evidence that the conductor and engineer were experienced men, and had proven themselves fully competent in every respect to manage and operate said train successfully. We do not think such evidence was relevant to any issue in the case. The appellee's right of action was based upon the negligence in the employment or retention of the agents in charge of the train.

A further objection urged is that the court permitted appellee to introduce Wigglesworth's Life Tables, as published in volume 3, p. xii, of Bush's Reports. As shown in the case of *Railroad Co. v. Lang's Adm'r*, *supra*, "this court has always approved instructions as to the measure of damages that authorized the jury to consider the age of the intestate, his capacity to earn money, and the probable duration of his life," and has frequently decided that these tables were competent evidence. *Railroad Co. v. Mahoney's Adm'r*, 7 Bush, 238; *Greer v. Railroad Co. (Ky.)* 21 S. W. Rep. 649. See, also, 5 Am. & Eng. Enc. Law, 67. Nor is the fact that they were permitted to be introduced after the testimony had been closed on both sides, and the witnesses discharged, error to the prejudice of appellant, as it is not anywhere shown that appellant had witnesses by whom to contradict or explain this evidence, and the trial court would have, doubtless, granted it time had application been made to obtain such witnesses.

Judgment affirmed.

Opinion by DU RELLE, J.

JUDD, ADM'RX, v. CHESAPEAKE AND OHIO RAILWAY COMPANY.

Court of Appeals, Kentucky, February, 1897.

STATUTORY ACTION FOR WRONGFUL KILLING OF PERSON—
DEFECTIVE MACHINERY—EVIDENCE.—Where a person is killed by
the negligence of another the right of action is statutory, and hence it is not
necessary to prove that the deceased was not aware of the defective machinery
causing the accident, the question being for the jury to determine.

Bogenschutz v. Smith, 84 Ky., 330, *distinguished*.

PETITION for rehearing. The former case is reported in 37 S. W. Rep. 842.

The case of *Bogenschutz v. Smith*, reported in 84 Ky. 330, 1 S. W. Rep. 578, was an action by the servant against the master to recover for injuries received, as alleged, by the negligence of the master, as by his failure to furnish safe or suitable apparatus or machinery for the use of the servant in the discharge of his duty, or, if such machinery or appliances were ever furnished, that they had become defective. The servant's right to recover was under the common law, and he was required to make out his case according to the rules of the common law. The case at bar is purely a statutory right, not existing under the common law; hence the case of *Bogenschutz v. Smith*, *supra*, is not like the case under consideration, and the decision in this case is not in conflict with the one relied on by appellee, even if it be conceded that the latter case announces the rule contended for by appellee. The adoption of the rule contended for by appellee would practically nullify the statute, for it would be impossible to prove that the decedent was not aware of defects, and could not have known thereof by the exercise of ordinary diligence, as, at any rate, such proof could rarely, if ever, be made. There is nothing in the statute to sustain the contention of appellee. The question as to whether the decedent knew of the defective machinery was a question for the jury, and not for the court.

Petition overruled.

Opinion PER CURIAM.

HANCOCK v. COOPER.

Court of Appeals, Kentucky, January, 1897.

GUARDIAN AND WARD — WHEN GUARDIAN NOT LIABLE FOR LEGAL PROCEEDINGS.—A guardian is not liable for loss, in distribution of estate, occasioned by the court in construing a will differently in petitions whereby one of the devisees did not get as favorable a decree as others, and there was no negligence on his part where he had placed the matter in the hands of reputable attorneys.

APPEAL from Circuit Court, Henderson County, from a decree dismissing petition by plaintiff.

P. B. CHEANEY and WM. R. MARRS, for appellant.

W. P. COOPER and MONTGOMERY MERRITT, for appellee.

Action by E. B. Hancock against James W. Cooper, her guardian at law. The points in issue are: Milan Hancock, in his will,

provided, among other things, as follows: "I do also leave in trust to my friend and brother-in-law, H. U. Grigsby, for the benefit of my son, Milan Hancock, Jr., and his children, two hundred and thirty-six acres of land. * * * Said land, at the death of my son, Milan Hancock, Jr., I wish equally divided between his children; and in case of the death of any of his children, they leaving children, said children are to receive a father's or mother's part." There is abundant authoritative construction of language similar to that employed here to the effect that the son, Milan, took an estate for life, and the children the remainder. Another clause of the will, however, may render this construction somewhat doubtful, and is as follows: "It is also my wish that said farm be cultivated annually, and that my friend and brother-in-law, H. U. Grigsby, shall see that the proceeds are judiciously appropriated for the support of my son, Milan Hancock, and his family, and in educating his children." What effect this provision should have on the construction heretofore suggested need not be determined, as the proper interpretation of the will is not now immediately involved; our only purpose in quoting it being to show that the true meaning is somewhat involved in doubt, and is a matter about which intelligent lawyers might well differ,—a fact pertinent to the question before us, as we shall presently see. Ella Hancock, the present appellant, was a daughter of Milan Hancock, Jr., and the appellee, at the instance of her father, qualified as her guardian when she was nineteen years of age. In obedience to what seemed to be the best interests of all the parties interested in the land, the appellee, as guardian, brought suit in the Henderson Circuit Court to sell it and invest or divide the proceeds. Accordingly he employed a firm of attorneys to bring the action, one of whom had been a circuit judge for some eighteen years, and the other a practicing attorney for some twenty-five years; and both of whom were of high standing, both professionally and otherwise. The averments of the petition were to the effect that Milan Hancock, Jr., took an estate for life in the certain tract, with remainder to the children,—Ella among the number. The will was referred to, and made part of the petition, but seems not to have been in fact filed. The land was sold, and the proceeds, in pursuance to the judgment of the chancellor, divided according to the construction indicated in the petition. Ella reached her majority in June, 1890, and in April, 1893, she filed the present action against her former guardian, the appellee, for the difference between what she ought to have received on a true construction of the will, namely, one giving her a present joint interest in the whole estate, and limiting the interest of her father to a joint estate with his children, but for his

life only, and what she in fact did receive of the estate, through the negligence and inattention, as she avers, of her guardian. Upon this state of case, the chancellor dismissed her petition, and, we think, properly so. It appears that subsequently to the distribution of the proceeds among the children of Milan Hancock, of whom there were five, and his creditors, the children filed their separate petitions in the suit, charging that their father had only a life estate in one-sixth part of the land; and the court reversed its former ruling, and adopted the construction for which the petitioners contended. Some of the children were therefore allowed to recover from the creditors the overpayment made them under the first construction. The appellant was not among those held entitled to recover,—perhaps because she was estopped by limitation, though the reason does not appear. We cannot see upon what principle the guardian can be held liable for the loss occasioned by the court not construing the will in the first instance as it did in its last judgment. If the pleadings were skilfully drafted, or an important exhibit omitted, the appellee had at least done all a prudent man could do, and all he would be expected to do, in the conduct of his own business. He was not learned in the law, and must have depended on his attorneys to properly prepare the pleadings and present the necessary exhibits showing the title of his ward. Moreover, just what interest his ward took was a matter about which, as we have seen, there was room for difference of opinion. A majority of this court is inclined to the opinion that the last construction of the chancellor was right, and yet it is a matter of extreme doubt. Why should the grandfather cut off his son, the head of a growing family, to a pittance,—a fractional part of his share of the estate,—and limit that to his life, leaving such share, as well as that of every child, uncertain, and dependent on the number of children born and to be born? Perhaps a more reasonable construction would have been to deny the creditors of Milan Hancock, Jr., any part of the estate, as long, at least, as it was necessary for the support of the family, or the education of his children. Under these circumstances, what could the guardian do, except to leave the questions involved to those skilled in the law? See *Harris v. Berry*, 82 Ky. 137.

Judgment affirmed.

Opinion by HAZELRIGG, J.

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SOUTH COVINGTON AND CINCINNATI STREET RAILWAY COMPANY v. ENSLEN.

Court of Appeals, Kentucky, January, 1897.

WAGON INJURED WHILE CROSSING STREET CAR TRACK—CONTRIBUTORY NEGLIGENCE.—In an action to recover damages for injuries sustained in a collision with an electric car, it appeared that plaintiff was driving along the car track, and looking back, saw a car approaching, but feeling he could clear a crossing before the car reached him, he drove ahead, and was nearly across the track when the car struck his wagon and was injured; *Held*, that the facts clearly showed contributory negligence and he could not recover.

APPEAL by defendant from judgment rendered for plaintiff in the Circuit Court, Campbell County. The facts appear in the opinion.

SIMRALL & GALVIN, for appellant.

E. H. KILPATRICK and E. W. HAWKINS, SR., for appellee.

HAZELRIGG, J.—Appellee's meat shop is situated on the north side of Eleventh street, in Newport, between Patterson and Isabella; Eleventh running east and west, and the other north and south. Eleventh is traversed by two tracks of the appellant's electric railway. On the morning of November 1, 1893, the horse and wagon of the appellee was standing in front of his shop, with the head of the horse turned towards the west, or Patterson street, that street being ninety-five feet away. The regular owner of the team came out of the shop, and, as he took his seat on the wagon, saw, coming rapidly from the east, and on the track next to him, the electric car of the appellant; but, as he testified, believing he had time to reach Patterson street, and turn south, out that street, and across the railway track, he started his horse on a trot for that purpose, driving, however, on the right, and entirely clear of track. From the time he started, he did not look back, or make any effort as he turned his horse upon the track, and drove on it, to see the approaching car, though his view was unobstructed, and though, by looking, as he admits, he would have seen the car. He had gotten nearly across, when the hind wheels of the wagon were struck by the car, the collision damaging both the wagon and the horse. Upon the trial of this action, brought by the owner of the property for its damages, the verdict was for the plaintiff. The distance at which the car followed the team from its starting point at the shop, to the crossing, is estimated by the different witnesses to have been from thirty to one hundred feet, according, as we suppose, to the time

when the particular witness testifying observed the two moving objects. As is common in such cases, the proof is conflicting as to whether those operating the car sounded the usual alarm for the crossing, though, after the driver turned to the crossing, and showed no intention to go on the track, there is no proof conducing to show any negligence on the part of the motorman, or want of effort to stop the car and avert the collision. In support of the finding of the jury, we shall assume that no signals were given for the crossing. So that, conceding the negligence of those managing the car in this particular, the sole question is: Was there such contributory negligence on the part of the driver of the team — which is to be imputed, of course, to the owner — as that, but for it, the accident would not have happened, and should, on that account, the peremptory instruction asked for by the company have been given?

We are clearly of the opinion that the request ought to have been granted. The only need for signals in the operation of a railway is to give warning of the approach of the car, and, if the driver of a vehicle already knows this, he cannot complain of the want of a signal. It could tell him nothing of which he was ignorant. Here the driver testifies that, knowing of the rapid approach of the car behind him, he yet trusted to the belief he started out with, that he could make the crossing safely, and therefore did not use any precaution whatever in driving onto the track. He did not look, but drove blindly in front of the moving and dangerous car. Had he from the start been driving on the track, it would have been the duty of the motorman to have seen him, and, if necessary in order to avoid the collision, to have checked or even stopped his car. As it was, the operator was not required to anticipate that the driver would suddenly quit his place of safety, and take up one of danger. Nor would a prudent driver have done so. This one, impressed with his original belief, miscalculated the chances, and the speculation miscarried by a few seconds.

Judgment reversed for proceedings consistent with this opinion.

LOUISVILLE AND NASHVILLE RAILROAD COMPANY v. COX.

Court of Appeals, Kentucky, February, 1897.

'INJURED IN COLLISION—EXTENT OF INJURIES.—Where plaintiff was injured in a collision between two of defendant's trains, alleging his injuries to be upon his back and side and to his kidneys or bowels, the question

as to whether he sustained such injuries is for the jury to determine from the facts.

APPEAL by defendant company from judgment rendered in the Circuit Court, Laurel County.

BOYD & CRAFT, and J. W. ALCORN, for appellant.

This action was instituted by the plaintiff against the defendant to recover damages for injuries alleged to have been sustained by him in a wreck by a collision between two of defendant's trains, upon one of which he was a passenger, which collision was alleged to have been caused by the wilful, negligent and careless acts of defendant's agents and employees. The injury occurred from the plaintiff's being thrown out of his seat against the wall of the coach, and on the seat, floor and side of said coach, with great force, at the time and by reason of the collision, inflicting injuries upon the body of plaintiff, his back, kidneys, bowels, breast, ankle, etc. Defendant did not deny the fact of the collision or that it was due to the negligence of its servants, but did deny that plaintiff was injured or was entitled to damages. Verdict was in favor of plaintiff for \$500 damages. Defendant contends that the instructions were misleading and that the damages were excessive. The instructions left to the jury to determine from the evidence the extent of plaintiff's injury and were not misleading, and the verdict was justified by the evidence. The damages were not excessive.

Judgment affirmed.

Opinion by BURNAM, J.

SOUTH COVINGTON AND CINCINNATI STREET RAILWAY COMPANY v. McCLEAVE.

Court of Appeals, Kentucky, February, 1897.

ARM OUT OF CAR WINDOW—DUTY OF CONDUCTOR. — It is the duty of a conductor of an electric car to warn a passenger, when he sees him in danger, and the contributory negligence of a passenger in putting himself in danger, does not relieve the conductor from the performance of that duty. So held in an action to recover damages for injury sustained while plaintiff had his arm out of a street car window.

EVIDENCE OF CONDUCTOR. — It is reversible error to exclude testimony of street car conductor, where it is alleged that the conductor failed to warn passenger of danger.

APPEAL from judgment for plaintiff rendered in the Circuit Court, Campbell County.

SIMRALL & GALVIN, for appellant.

WRIGHT & ANDERSON, for appellee.

Appellee alleged in his petition that while occupying, as passenger, a seat in an electric street car belonging to appellant, that was going over the bridge from Cincinnati, Ohio, to Newport, Kentucky, his right elbow, which protruded through the window slightly outside the car, came in contact with an iron girder of the bridge, and his arm was broken in two places; that said injury resulted from negligence of appellant in failing to provide a screen or guard on sides of the car, so as to prevent passengers putting their arms or other parts of the body outside the windows; and in failing to put on the inside of the car printed notice or warning of the danger to passengers thus exposing their persons. A general demurrer to the petition was sustained, and in an amended petition appellee stated that the conductor having charge of the car in which the injury occurred saw appellee's danger in time to have warned him and so have avoided injury. The answer denied this allegation, and alleged contributory negligence but for which the injury would not have occurred. Appellant requested the court to instruct the jury to find for it upon the hypothesis that appellee would not have been injured but for his own negligence in putting his arm so far outside the car as that it came in contact with the bridge, which request to instruct was, however, refused. There was no error in such refusal to instruct, for no degree of contributory negligence on the part of even a trespasser will release a person in charge of a train or single car, whether operated by steam or electricity, from the legal obligation to use reasonable effort to avoid injuring him if his peril is discovered in time to do so, and the failure of a conductor to so warn passengers, although the latter may be negligent, is not a legal excuse for non-performance of that duty. The court erred, to appellant's prejudice, in refusing to permit the conductor of the car to testify, for on the single issue presented, as to whether he saw appellee's position, he could probably better than any other person know and state.

Judgment reversed and new trial granted.

Opinion by LEWIS, C. J.

PFAFFINGER v. GILMAN.

Court of Appeals, Kentucky, February, 1897.

INJURED BY WILD BULL.—Where a number of bulls belonging to defendant were being driven through the public streets and one of them, a wild and vicious animal, while plaintiff was attending to his business, attacked and injured him, the jury were justified in finding for plaintiff, as it was negligence to drive such animals through the street.

APPEAL from judgment rendered for J. T. Gilman in the Circuit Court, Jefferson County.

M. A., D. A. & J. G. SACHS, for appellant.

A. A. STOLL and J. W. S. CLEMENTS, for appellee.

J. T. Gilman instituted this action in the Jefferson Circuit Court, Common Pleas Division, against Margaretha Pfaffinger, William Pfaffinger, John Schwartz, executor of Jacob Pfaffinger, doing business under the firm name of Pfaffinger & Co., and P. C. Bennett, to recover damages for injuries inflicted upon him by a wild and vicious bull, which bull was, as alleged, turned loose by defendants upon the streets of Louisville, which bull was known to the defendants to be vicious, or they could, by ordinary diligence, have known the fact. The defendant Bennett, by separate answer, denied all the averments of the petition so far as he was concerned, and a motion was finally sustained to instruct the jury to find for him, and judgment entered dismissing the action as to him, although no formal verdict was in fact returned as to him. The other defendants, for joint and separate answer, denied that they were doing business as a firm under any name; also denied the allegation of the petition as to appellee's injuries, as well as the averment that the bull was under their control, or that they knew, or could by ordinary diligence have known, the bull was wild or vicious; and pleaded contributory negligence on the part of appellee. A trial resulted in a verdict and judgment against appellant for \$750.

Before the case was submitted to the jury, the defendants moved the court to instruct the jury to find for the defendants other than the appellant, which was overruled. The verdict was simply, "We, of the jury, find for plaintiff, and assess the damages at \$750 (seven hundred and fifty dollars),"—signed by eleven of the jury. The judgment was rendered only against the appellant, who now contends that it was error not to render it against the other defendants; but as it was agreed in writing that appellant alone was the sole owner of the business for which it seems the bull was purchased, it

is difficult to see how she was injured by the judgment being rendered against her alone, and it further appears that it was the contention of counsel, before submission, and after the testimony was all heard, that the case should be dismissed as to the other defendants. If any of the defendants were liable for the damages claimed, it is clear that appellant was the one in law and justice that ought to pay, and would have to pay, the judgment. The defendant did not introduce any testimony. It is also contended by appellant that the parties owning the bull were independent contractors, hence appellant is in no event liable for the damages suffered by appellee. It is pretty evident that Bennett had bought the five bulls, one of which inflicted the injury complained of, for appellant, and that it was his business to receive the same at the stock yards, and that she paid the parties for driving the stock from the stock yards to her place of business or to her stock pens. It is pretty clear that it was negligence to turn these bulls loose in the streets of Louisville. It is manifest from the evidence that appellee was not guilty of any contributory negligence. He was engaged in attending to business requiring his attention, when the bull came up behind him, and inflicted the injury. The verdict is not excessive according to the proof.

Judgment affirmed, with damages.

Opinion by GUFFY, J

MURDOCK v. NEW YORK & BOSTON DESPATCH EXPRESS COMPANY.

Supreme Judicial Court, Massachusetts, February, 1897.

RUNAWAY HORSE INJURING PEDESTRIAN.—The owner of a runaway horse that injured a pedestrian was guilty of negligence in leaving the horse unfastened in the street.

EVIDENCE—DAMAGES.—Evidence of average monthly earnings in an action for damages for personal injuries, is proper.

ACTION in Superior Court, Plymouth County. Verdict for plaintiff and defendant brings exceptions.

ROBERT O. HARRIS, for plaintiff.

BENTON & CHOATE, for defendant.

HOLMES, J.—This is an action for running the plaintiff down by a runaway horse. It is not for us to consider that our verdict would be on the printed report, but only whether, on the evidence, the

presiding judge could have taken it from the jury. The horse was left standing close behind another wagon, and, it would seem likely, caught its bridle on a T-shaped handle of a door in the rear of the wagon, pulled its bridle off, and in this way was started on its run. There was testimony that the horse was fastened by a strap to a 20-pound weight when he was left. But there was no weight attached at the moment of the accident, and that fact and the escape of the horse are some evidence that he was left without one. We cannot say that the jury were not warranted in finding the defendant negligent. See *McDonald v. Snelling*, 14 Allen, 290, 297; *Barnes v. Chapin*, 4 Allen, 444 (1); *Telegraph Co. v. Quinn*, 56 Ill. 319; *McCahill v. Kipp*, 2 E. D. Smith, 413; *Rumsey v. Nelson*, 58 Vt. 590; 3 Atl. Rep. 484; *Garlick v. Dorsey*, 48 Ala. 220 (2); *Goodman v. Taylor*, 5 Car. & P. 410 (3).

The plaintiff was allowed to testify to his average monthly earnings, and an exception was taken. We are of the opinion that the evidence was admissible. There is no question of pleading about it. A part of the immediate damage in all such cases is that the plaintiff is prevented from working. To ascertain the economic value of what he is deprived of, there seems to be no better help than to take his average earnings in the past, subject, perhaps, to the cautions to be found in the English cases. *Phillips v. Railroad Co.*, 5 C. P. Div. 280, 286, 290, 5 Q. B. Div. 78, 81, 4 Q. B. Div. 406, 408 (4); *Armsworth v. Railroad Co.*, 11 Jur. 758,

1. *Barnes v. Chapin*, 4 Allen (Mass.), 444, is reported in 1 Am. Neg. Cas. 310.

2. *Garlick v. Dorsey*, 48 Ala. 220, is reported in 1 Am. Neg. Cas. 262.

3. In *Goodman v. Taylor*, 5 C. & P. 410, an action for injury to a horse by a pony and chaise running against it, it was shown on the part of the defendant that his wife was holding the pony by the bridle, and a showman came by and frightened the pony, and it ran off with the chaise: *Held*, that, if true, this was a defense under not guilty.

4. In *Phillips v. L. & S. W. R'y Co.*, 5 L. R. C. P. 280, 49 L. J. C. P. 233, 42 L. T. N. S. 6, an action against a railway company for personal injury to a

passenger, it was *held* that the jury in assessing the damages may take into consideration, besides the pain and suffering of the plaintiff, and the expense incurred by him for medical and other necessary attendance, the loss he has sustained through his inability to continue a lucrative professional practice.

See also *Phillips v. L. & S. W. R'y Co.*, 5 L. R. Q. B. 78, 41 L. T. N. S. 121, 28 W. R. 10; *affirming* 4 L. R. Q. B. 406, 48 L. J. Q. B. 693, 40 L. T. N. S. 813, 27 W. R. 797, where it was *held* that the court will grant a new trial in an action for personal injuries, sustained through the defendant's negligence, on the ground of the inadequacy of the damages found by the jury, when it appears upon the facts proved, that the jury must have

760 (1); *Ehrgott v. Mayor, etc.*, 96 N. Y. 264, 275, 276; *Express Co. v. Nichols*, 33 N. J. Law, 434, 437; *Railroad Co. v. Dale*, 76 Pa. St. 47; *Welch v. Ware*, 32 Mich. 77, 81; *Parshall v. Railway Co.*, 35 Fed. 649, 651; *McNamara v. Village of Clintonville*, 62 Wis. 207, 210, 22 N. W. Rep. 472; *Collins v. Dodge*, 37 Minn. 503, 35 N. W. Rep. 368; *Myhan v. Power Co.*, 41 La. Ann. 964, 969, 6 South. Rep. 799. See *Ballou v. Farnum*, 11 Allen, 73, 79.

Exceptions overruled.

LYNCH v. SWAN.

Supreme Judicial Court, Massachusetts, February, 1897.

DEFECTIVE ENTRANCE STEP TO TENEMENT—INJURY TO TENANT.—

A landlord is not liable for injuries to a tenant occasioned by the breaking of an entrance step used in common by the tenants, where there is no proof that the landlord was negligent in not discovering the defect and repairing the step.

FROM Superior Court, Hampden County. The judge directed a verdict for defendant and reported the case for the determination of the Supreme Judicial Court.

T. A. FITZGIBBON and J. L. DOHERTY, for plaintiff.

WALTER S. ROBINSON, for defendant.

The plaintiff lived in a tenement house and the only entrance from the street was by means of an uncovered flight of seven steps leading into the front door opening into the hall. The steps and hall were used in common by all the tenants. The plaintiff was injured while walking up this staircase or steps just before noon on October 1, 1894, by one of the steps breaking or giving away.

The fact that one of the steps broke under the weight of the plaintiff is some evidence that, in fact, this step was not strong enough, and the question is whether there was evidence that the defendant knew this or ought to have known it.

The contention of the defendant is that his duty was "only that

omitted to take into consideration some of the elements of damage, properly involved in the plaintiff's claim.

1. In *Armstrong v. South Eastern R'y Co.*, 11 Jur. 758, it was *held*, that the damages are not to be estimated according to the value of the deceased's life, calculated by annuity tables, but

the jury should give what they consider a fair compensation. The proper question for the jury in such cases is, whether the circumstances are such, that if the deceased, instead of meeting his death, had been only wounded, in consequence of the conduct of the defendant, he would have been entitled to damages for the injury.

of due care to keep the steps in such condition as they were in at the time of the letting of the tenement to the plaintiff or her husband," and that he "was not bound to make them better than they were at the time of the letting." This is true if the steps had been a part of the tenement let, over which the landlord retained no control, unless the condition of the steps was such as to constitute a trap, which the tenant could not discover by the exercise of reasonable care. *Bowe v. Hunking*, 135 Mass. 380.

The landlord is not bound to change the original construction of steps when the mode of construction was apparent at the time of letting. *Woods v. Cotton Co.*, 134 Mass. 357; *Lindsey v. Leighton*, 150 Mass. 285, 22 N. E. 901. This doctrine sometimes has been held applicable where the condition as to strength or soundness of steps or of a platform used in common by different tenants, was well known to the tenant at the time of the letting and he was content to take the premises as he found them. *Quinn v. Perham*, 151 Mass. 162, 23 N. E. 735; *Moynihan v. Allyn*, 162 Mass. 270, 38 N. E. 497. But it is going too far to hold it applicable in all respects to the outer steps of a tenement house, which are under the control of the landlord and are apparently sound and strong at the time of the letting, and are not known to the tenant, but are or ought to be known to the landlord to be unsound or of insufficient strength. *Lindsey v. Leighton*, *supra*; *Leydecker v. Brintnall*, 158 Mass. 292, 33 N. E. 399; *Wilcox v. Zane*, 45 N. E. 923, 1 Am. Neg. Rep. 83.

In the present case the presiding justice who ordered a verdict for the defendant could better understand the evidence than we can from the report. From the evidence it is possible or probable that the tread which gave away did not break across the grain, or transversely, to the length of the step, but that it split where it was nailed at the end, and that the two pieces turned in so as to make an opening through which her leg went. We cannot say as matter of law that the presiding justice was wrong in directing a verdict for the defendant. It may be that the defect in the step, if there was one, appeared, from the step itself with the other evidence, to be of such a nature that a jury could not properly find that the landlord was negligent in not discovering the defect and repairing the step.

Judgment on verdict.

Opinion by FIELD, C. J.

WALKER v. LAKE SHORE AND MICHIGAN SOUTHERN RAILWAY COMPANY.

Supreme Court, Michigan, February, 1897.

STATUTORY ACTION — DAMAGES.—In an action under the statute to recover for the death of a person, due to defendant's negligence, the damages to be awarded must be limited to the pecuniary loss sustained by the party bringing suit, and it is error to instruct the jury that they may award damages for loss of nurture, instruction and moral and physical training of the deceased's children, where there is no evidence as to such.

FROM a judgment rendered for plaintiff in the Circuit Court, Kalamazoo County, defendant brings error.

BOUDEMAN & ADAMS and C. E. WEAVER, for appellant.

OSBORN, MILLS & MASTER (E. S. ROOS, of counsel), for appellee.

Action brought under the statute to recover damages for the negligent killing of plaintiff's intestate. There was a former appeal (reported in 62 N. W. Rep. 1032), when a new trial was granted, the result of the trial being a verdict for plaintiff for \$7,360. On appeal the charge of the trial court was assigned as error. The charge as regards the liability of defendant was fairly given, but the charge relating to damages was erroneous. In his charge the judge said: "In estimating the plaintiff's damages, you would be at liberty to take into consideration the nurture, instruction, physical, moral, and intellectual training which you may be able to find by the testimony the children of John Walker would have received from their father, had he lived during their minority; that is, until they attained the age of twenty-one years." There was error in permitting the jury to consider damages in this respect, as it has been frequently decided that in an action for the recovery of damages for death by wrongful act, based upon our statute, the damages to be awarded must be limited to the pecuniary loss sustained by those in whose interest the case is prosecuted. *Railway Co. v. Bayfield*, 37 Mich. 214; *Balch v. Railroad Co.*, 67 Mich. 394, 34 N. W. Rep. 884; *Mynning v. Railway Co.*, 59 Mich. 261, 26 N. W. Rep. 514; *Van Brunt v. Railroad Co.*, 78 Mich. 530, 44 N. W. Rep. 321; *Nelson v. Railway Co. (Mich.)* 62 N. W. Rep. 993 (1). There was

1. The court, in its opinion on the former appeal, said: "We are aware that some courts have held that the jury may take into account the loss sustained by the children of the deceased for loss of physical care and mental and moral training of the father or mother, and we are not prepared to

no evidence on this matter. It was not claimed that deceased was in any sense a tutor to his children. The most that can be inferred is that he rendered to them occasional assistance, such as a parent is supposed to render to his children, but which in its very nature is as incapable of measurement by a pecuniary standard as is the loss of love, affection, and sympathy. See *Railroad Co. v. Austin*, 69 Ill. 426; *State v. Balt. & O. R. Co.*, 24 Md. 106.

Judgment reversed.

Opinion by MONTGOMERY, J.

WELSH V. CITY OF LANSING.

Supreme Court, Michigan, February, 1897.

FALLING INTO EXCAVATION—WHEN CITY NOT LIABLE.—Where a person fell into an excavation on the sidewalk and there was positive evidence as to the laying of planks upon barrels to prevent danger to persons passing, there was not sufficient evidence to support the claim of negligence against the city, and judgment for plaintiff was reversed.

ERROR to Circuit Court, Ingram County. From judgment rendered for plaintiff, defendant brings error.

CLARK C. WOOD, for appellant.

ATKINSON & ATKINSON (JASON E. NICHOLS, of counsel), for appellee.

The plaintiff was injured by falling into a cellar, and recovered judgment against the city. The following is a description of the premises: At the corner of Ottawa and Grand streets, fronting north, is the Michigan Supply Company building. In front is a stone walk twelve feet wide. Next the building is a basement stairway, surrounded by an iron railing, which descends from the west. Immediately west of this building was the cellar in question. In front of this was a concrete walk, the south side of which was on a line with the stair rail mentioned. The plaintiff testified that he turned from Grand street, upon Ottawa, passed west upon the stone sidewalk in front of the building occupied by the Michigan Supply Company, and fell into the excavation. He testified that he saw no

say that cases may not arise in which there may be sufficient proof of damages suffered by reason of the withdrawal of these ministrations which will justify a recovery upon that basis. But it is distinctly against the previous

holdings of this court to say that such elements may be considered, and the jury left to roam at large, and draw upon their imagination as to the extent of the injury suffered through this cause."

building material in the street, and no evidences of building there, before he went into the excavation, and that there was no barrier or guard around the excavation so far as he knew; that he met with none, but walked off the sidewalk without hindrance or notice, but, after he got out, he noticed some barrels and a plank, the plank being up against the bank, and running down into the cellar towards the south. Mr. Eicher, an alderman of the city, testified that at the west side of the cellar, that being the place where dirt was drawn in, he noticed that it was in bad shape, and he told some of the workmen about July 1st that it ought to be boarded up, so that people could not get by it at all,—that “they should be made to go clear around;” and, on the night of July 4, some boys, who had taken some whips from some buggies with which to have some sport, saw him and his hired man, and started to run, and were followed by them. They ran north to Ottawa street, and then west. Witness had followed them from the Chapman House, on Michigan avenue, a block south of Ottawa, and reached the corner of Grand and Ottawa in time to see them run into the cellar when he was about ten feet behind them. He testified that there was no guard where they went in; that there was a barricade on the north side of the excavation, consisting of planks and barrels, sitting east and west on the tar walk, which left a space to walk between the barrel and iron railing; that was where the boys ran. He said that the barrels and plank could be seen plainly. He testified further that, “of course, the barricade was all down daytimes; that the barrels would protect any one coming from the north; and that he asked the men to nail up the west end.” There was other evidence as to the state of the sidewalk. Upon the part of the defendant it was shown that care was taken to surround the excavation by planks laid upon barrels, one of which extended from the barrel furthest east to the iron stair rail; that this was the uniform custom; and that it was so placed on the night of the accident, by men whose business it was to remain and see that the line was covered up, the barricade put up, and everything straightened up. There is positive evidence of the erection of the barricade on the night in question, corroborated by the statement of the plaintiff that a plank extended towards the south from the bank into the cellar, which is consistent with the theory that it had been removed. No claim is made that a barricade consisting of planks laid upon barrels completely fencing in a shallow excavation made for temporary purposes is not a reasonable one, and, if there were, we should be inclined to say that it is sufficient, as matter of law, in a case like this, and that it should not be left to the jury to say that it was not, under ordinary circumstances. We

are of the opinion that there is an absence of proof to support the claim of negligence upon the part of the city. The most natural inference from the testimony is that the board was removed in some unexplained way, for which the city is not shown to be in any way responsible.

Judgment reversed.

Opinion by HOOKER, J., LONG, C. J., and GRANT AND MOORE, JJ., concur.

MONTGOMERY, J., dissented on the ground that there was evidence of negligence sufficient to justify the submission of the case to the jury.

TURNER V. ST. CLAIR TUNNEL COMPANY.

Supreme Court, Michigan, February, 1897.

MASTER AND SERVANT—LAW OF PLACE—INJURED IN TUNNEL.—

An accident to an employee of a tunnel company occurring while working on the Canadian side of the tunnel is governed by the law controlling such cases in Canada.

ERROR to Circuit Court, St. Clair County. From judgment for plaintiff, defendant brings error.

GEER & WILLIAMS, and L. C. STANLEY (E. W. MEDDAUGH, of counsel), for appellant.

CHADWICK & MCILWAIN, for appellee.

The defendant is a corporation, and was engaged in constructing a tunnel under the St. Clair river between Ft. Gratiot, Mich., and Port Sarnia, Ontario. Compressed air was used to prevent caving, access to the tunnel being had through an air-lock, in which the air was made to correspond in density with that in the tunnel or with that of the atmosphere outside, by the use of valves. Letting air into the lock from the tunnel accomplished the former, and allowing it to escape outside from the lock effected the latter. It was known by defendant that those who entered the tunnel experienced an inequality of air pressure, which, for a time, at least, caused an unpleasant pressure from the outside upon the eardrums, and perhaps a similar pressure from within upon going out. It was also known that after going out some persons were attacked with violent pains in the members and joints, which, among the men, at least, went by the name of "the bends." It is, perhaps, not improper to say that these were more common among beginners in work in compressed air, and that it was generally understood that they might

be avoided, or at least that the danger of their occurring might be greatly lessened, by changing the pressure gradually and slowly in the lock. It was shown that the practice of the company was to require an examination by a surgeon of the men employed, to ascertain that they were in a proper physical condition to make it prudent for them to work in compressed air. This tunnel was constructed by starting a drift from each side of the stream, and each had its overseer or superintendent, though both were under one management. Mr. Hobson was chief engineer, Murphy had charge of the excavation, and Eams was in charge of the mechanical work and the working of the machinery. Minto was assisted by Eams, and looked after work at the Canadian end. Hushin was employed by Eams as mechanical foreman on the Michigan side. The plaintiff was employed by Hushin, and first worked outside as a laborer, but was desirous of getting a job where he could draw more pay, which seems to have been understood to mean that he applied for work inside, and he was finally given such work, and worked a day, or perhaps two, before the occurrence which gave rise to this action. After the plaintiff commenced work in compressed air, he and three or four others were requested or directed by Hushin to go to the Canadian side to work, and to report to Minto, which they did, and they were set at work in the tunnel, where, after working eight hours, they were persuaded by the overseer in charge to remain for another shift of eight hours. At the end of that time they came out through the lock. They started for the Michigan side, but before getting across the river the plaintiff was attacked by the bends, and had to go home. He became unconscious, and when he recovered consciousness he found that he had lost his hearing altogether. There was testimony from experts tending to show that they had patients whose ears were temporarily affected by work in compressed air, but it is claimed that it was shown that up to the time of plaintiff's experience no case of total deafness or permanent injury to the ears had fallen within the observation of the defendant or any of the witnesses. This action was brought, charging the defendant with negligence, and plaintiff recovered a verdict and judgment, which the defendant has brought to this court by writ of error. The chief point raised by the defendant is that the work was voluntarily performed in Canada, and that the case is governed by the law of the province, which does not permit a recovery. At the threshold of the case lies this question, because, if it is true that under the law of Canada there could be no recovery, it is the end of the case, unless it can be said that the law of Michigan governs. In support of their contention counsel for the defendant cite a number

of cases where wrongs were perpetrated in foreign States; such wrongs as assaults and batteries, malicious arrests and prosecutions, and false imprisonment, injuries to passengers and employees on railroads, etc. In all of these cases the rule is said to be that the action for the wrong is transitory, and that the right of recovery depends upon the law of the place where the tort is committed. In this case the alleged wrong consisted in allowing the plaintiff to enter upon a dangerous work, in ignorance of dangers known, or which it is said the defendant should have known, whereby the plaintiff was injured. This occurred in Canada, and we are of the opinion that the case falls within the authorities mentioned, which will be found cited in the briefs of counsel. Counsel for the plaintiff claim that the breach of duty occurred in the United States, by the defendant falsely assuring the plaintiff that the employment was safe. Continuing, he says: "There are two elements necessary to constitute liability for negligence, viz., wrong and injury. Neither alone is sufficient. While it is true that negligence without injury gives no right of action, it is equally true that injury without negligence gives no right of action. The action is based on negligence. Negligence is simply a neglect of duty. The neglect of duty constitutes the 'wrong' which gives the right of action, which is founded upon the application of the general principle of law that 'where there is fault there is liability.' The breach of duty, and fault, and wrong were all on the American side. Upon these plaintiff's right of action is founded. The injury is but the result of the breach, the fault and the wrong. The injury alone created no liability. It is defendant's connection with the responsibility for the injury which makes it liable, and that responsibility was fixed upon defendant when it gave the wrongful order which resulted in the injury. None of the cases cited by defendant are authority for the case at bar. They do not contain the initial wrong by the master to the servant injured which creates the right of action, viz., the deceit and wrongful order. They are all cases where the tort was committed in some foreign country or state. In this case the tort was committed on the American side, and committed by the master."

If it is true, as counsel concede, that the liability rests upon the concurrence of an injury and a neglect of duty, without which neglect the injury would not have occurred, the tort cannot be said to have been committed in Michigan, and it can be said to have been done in Canada, where the dangerous service began when the plaintiff entered the dangerous place without warning, and which warning up to that time might have been given by the master or any

other person. If, before he incurred the risk, knowledge of the danger came to the plaintiff in any way, or from any source, there would have been no actionable wrong. Counsel have not cited an authority for the position taken, and we think, as already stated, that the law of the place of the injury as to the duty of the master must apply. See *Wingert v. Circuit Judge*, 101 Mich. 396, 59 N. W. 662; *Suth. Dam. sec. 1280*. The trial court reached a different conclusion upon this troublesome question, and we are constrained to hold that therein he erred. The importance of this ruling is seen in the following statement of the question involved: For plaintiff it was asserted that it was the duty of the master to warn the plaintiff that an increased and higher pressure was maintained in the Canadian tunnel than in the Michigan, where the plaintiff had worked, and that this increased the danger; also that it was dangerous to work for twice the usual time in this high pressure, and that greater deliberation in passing the lock in such case was necessary to safety. If the Michigan rule was to be applied, giving notice of the danger was a duty of the master, which he could not escape by authorizing a representative to perform it; while, if the Canadian rule governs, it was claimed that the master might safely leave that to a competent foreman, his duty being discharged by the exercise of due care in the selection and employment of such foreman. From the evidence offered such would seem to be the law in Canada, and the injury to the defendant's case by the ruling is manifest.

Judgment reversed.

Opinion by HOOKER, J.

MCHUGH v. CITY OF ST. PAUL.

Supreme Court, Minnesota, February, 1897.

DRIVING BEYOND STREET LIMIT — FALLING OVER EMBANKMENT — CITY NOT LIABLE.— Where plaintiff was injured by falling off an unfenced embankment while driving along a public street, defendant was not liable, as plaintiff had taken the risk to go beyond the limits of a properly graded street, the street being free from latent or patent defects.

STREET LIGHTING — WHEN CITY LIABLE.— A city is under no obligation to light its streets, and a mere neglect to do so is not a ground of liability, unless the duty is imposed by charter.

FROM a verdict for defendant in the District Court, Ramsey County, and an order refusing new trial, plaintiff appeals.

GEO. C. LAMBERT, for appellant.

EDWARD J. DARRAGH, for respondent.

On March 22, 1895, and for many months prior thereto, Burgess street was a common thoroughfare in the limits of the city of St. Paul, and upon which street, at the time of the injury complained of, the plaintiff was a resident. This street had been graded several years, and in places there was a filling of earth about eleven feet deep across a marsh, and it was at a point upon this filling or embankment where the accident occurred. The street was sixty feet wide, thirty-four feet between the gutters, which were three feet wide and seven inches deep, and the ground leveled off ten feet outside of the gutter for a sidewalk. The slope from the outer edge of the sidewalk to the bottom of the embankment, and down to the marsh, was one foot vertically to one and one-half feet laterally. The plaintiff was a mail clerk, and also owned a grocery store in St. Paul, and on his way home he would occasionally stop at the house of one Mrs. McCusick, residing on the right-hand side of Burgess street, and get orders on his grocery store from her. On the night of the accident, March 22, 1895, the plaintiff was on his way home, driving along this street, and intended to stop at Mrs. McCusick's, and obtain an order from her for such groceries as she might want the next day, when his horse turned towards the house, as he supposed, and, stopping near the edge of the street, was, with the wagon and plaintiff, precipitated down the embankment, and plaintiff personally injured.

The grounds of negligence alleged are: 1, that the defendant city had neglected to build a fence or railing along the edge of this street, to prevent the traveling public from falling into the marsh; 2, that defendant neglected to furnish lights to enable travelers to avoid this dangerous place. There was no claim made that the street was improperly or unskilfully graded, or that the embankment was not properly constructed. Plaintiff was perfectly familiar with the street and neighborhood, with the location of the house, and that it was near, or, as he testified, alongside of, the marsh. One of two things quite conclusively appears, viz., that he allowed his horse to go to the place of the accident unguided, or else that he drove the horse there himself. The undisputed evidence showed, by the wagon tracks, that, when nearly opposite the place of accident, his horse turned nearly at right angles with the highway, and in so doing, if he was in the traveled part of the road, he must have passed over the gutter, three feet wide, and the sidewalk, ten feet wide, before reaching the edge of the street, from which point he was precipitated down the embankment. There was no snow in the street, but some snow and mud in the gutter; but the stones in the gutter could be readily seen by daylight. Evidently he supposed he

was nearly opposite the house of Mrs. McCusick, his place of destination; but, in driving, or permitting his horse to turn, from the main track too soon, and allowing him to go too far, the accident occurred only a few feet from Mrs. McCusick's house. The plaintiff's familiarity with the street, the McCusick house, and the embankment, and the manner in which the horse was managed, were important factors in the case, all of which were admitted; and all the facts appearing show conclusively that plaintiff was guilty of negligence in his conduct, resulting in being precipitated down the embankment, and which caused the injury. If he saw fit, on a dark night, as this was, to encounter the risk of going with his horse and wagon to Mrs. McCusick's house, and thus pass beyond the limits of a properly and skilfully graded street, without any latent or patent defects in it, and the injuries received were beyond the line of such street, we do not think the city liable.

This court has already held, in the case of *Miller v. City of St. Paul*, 38 Minn. 134, 36 N. W. Rep. 271, that a city is under no obligation to light its streets, and a mere neglect to do so is not a ground of liability, unless the charter expressly imposes the duty. This is the general rule, and, if there are exceptions, the facts herein do not bring this case within the exception. Nor are towns necessarily bound to fence, or erect barriers, to prevent travelers from getting outside of the road or way. 2 Dill. Mun. Corp. (4th ed.) sec. 1005 (1). Considering the fact that Burgess street, in its entire width of sixty feet, was graded, and in good condition; that plaintiff

1. The reason for the rule is well stated, in cases of this kind, in *Sparhawk v. City of Salem*, 1 Allen (Mass.), 30, as follows: "It appears that the highway in question was safe and convenient for travelers throughout its entire width, and the land adjoining it was also safe and convenient to travel upon. After getting entirely outside the highway in safety, the traveler must proceed further in order to reach a dangerous place. If he reached that place, and was injured, the want of a railing was remotely, and not immediately, connected with the injury. If cities and towns are bound to protect travelers against such dangers by erecting railings to prevent them from straying out of the highway, it is difficult to see the limit of their liability.

In passing over an unfenced plain in the night-time, the traveler might stray away from the road to a great distance, at the risk of the town, unless they fenced in their whole highway; or he might, by mistake, enter a private way, or an open space, such as is often about a farmhouse, or a large public common, or an unfenced forest, and hold the town responsible for any injury he might receive there, because they had not fenced against the private way, or open space, or common, or forest. Indeed, they would be liable to him for any injury he might receive from coming in collision with any building or structure in the city by straying beyond the limits of a street in the dark, unless they provided railings along all their public streets."

was well acquainted with the neighborhood ; that he turned his horse purposely, or allowed him to turn, at right angles with the street, and had to pass over the gutter and sidewalk before reaching the embankment,— and all the other attending circumstances, the trial court was fully justified in directing a verdict for the defendant, and denying the motion for a new trial.

Order affirmed.

Opinion by BUCK, J.

MOORE v. GREAT NORTHERN RAILWAY COMPANY.

Supreme Court, Minnesota, February, 1897.

EMPLOYEE KILLED IN SWITCH-YARD — CUSTOM OF MOVING TRAINS.— In an action to recover damages for the killing of plaintiff's intestate, a yard switchman in defendant's employ, where it appeared that a custom in regard to the operation of trains, designed for the protection of employees, had not been observed, and it also appeared that if it had been observed it would have been of no service in the case at bar, a verdict cannot be based solely on the non-observance of the custom.

APPEAL by defendant from verdict rendered for plaintiff in District Court, Hennepin County.

W. E. DODGE, for appellant.

CHARLES G. LAYBOURN and F. D. LARRABEE, for respondent.

The plaintiff's intestate, while in defendant's employ as a day switchman in its Minneapolis yard, was killed by a train, and this action was brought, under the statute, to recover damages for such killing. The yard in question consisted of five parallel tracks, fourteen feet apart from center to center, extending in an easterly and westerly direction. The northerly track, extending from the westerly end of the yard in an easterly direction, was a side track used for storage and transfer purposes. The next, on the south, was known as the " mill lead " track, and used for making up strings of cars, and for transferring. South of this was the east-bound passenger track, and south of this was the west-bound passenger track, while on the extreme south was that known as the " Minneapolis Western." Just south of this yard was that of the Chicago, Milwaukee & St. Paul Company, from the tracks of which was a transfer or switching track, which led to and across all of the defendant's tracks, except the one on the extreme north. This track was used exclusively for transferring freight cars from one yard to the other,

or from one track to another in defendant's yard; and on the north side of all of defendant's tracks, just about opposite where the switch connected with the Minneapolis Western track, was the usual switch house. The westerly end of the yard was more than 1,500 feet west of the switch-house, and a semaphore, with a stationary light, was located at this west end, not far from the switch whereby cars were transferred from the mill lead track to the one upon the north of it, used for storage and transfer purposes. These tracks were all sunk below the natural surface of the ground, and near the west end of the yard was an overhead iron bridge, upon University avenue, while easterly, a little more than 300 feet, were two overhead bridges of iron,—one on Fourth street, the other on Fifteenth avenue. The deceased was an experienced man, and at the time of his death had been in defendant's employ as a switchman in this yard for about five years. About half-past five in the afternoon on the day in question, one of defendant's switching locomotives, with twenty-one freight cars and the usual switching crew, came from the direction of the other yard upon the transfer track, and were stopped south of the southerly switch until an east-bound passenger train had passed. Plaintiff's intestate, Moore, then crossed the yard from the switch-house, and in succession opened all of the switches on the transfer, so that the locomotive and cars finally reached the mill lead track, and thence proceeded westerly until the locomotive passed the switch connecting the track last mentioned with the one north of it. Here the locomotive was uncoupled from the cars, went upon the track last mentioned, was attached to other cars, and, pulling back upon the mill lead track, proceeded to make up the train with the cars brought from the other yard in the rear. This brought two furniture cars on the hind end, each thirteen feet five inches high from the top of the rails to the running board,—so high, in fact, that the distance between the running board and the beams of the overhead bridges, when the cars were passing underneath, was about three and one-half feet. It was, of course, impossible for a brakeman to stand on the top of one of these cars and pass under the bridges in safety. After making up the train, it was backed easterly along the mill lead track,—the furniture cars in front,—to a point east of the switch-house, and, soon after it had passed, the lifeless body of Moore was found lying between the rails, a few feet east of the point where the transfer connected with the mill lead track. No one witnessed the casualty, but it was shown that, after Moore switched the locomotive and cars upon the mill lead track, and they had proceeded westerly, he set the switches for through trains, then went to the switch-house, procured lights, and set one

upon each of the switches on the transfer track. His duty was, then, to walk westerly to the semaphore, light the stationary lamp, and return to the switch-house. This he could do without crossing a track. From all the circumstances which appeared in evidence, it is safe to conclude that, after setting out the light at the switch, where the transfer track connected with the mill lead track, Moore walked westerly towards the semaphore, for some reason stepped upon the track on which the locomotive was backing the cars, was struck by the one in front and knocked down, and that his body was then dragged easterly, along the track, a few feet, to the point where it was found. It was shown that at or about the time the locomotive engineer started to back up, under orders from the foreman of the switching crew, a passenger train passed by upon the east-bound track, running at about twenty-five miles an hour, and that the locomotive of this train was emitting at this time a large volume of dense, black smoke, which settled under the bridges and upon the ground, from the west end of the yard to a point east of where Moore's body was found. This train was upon its regular schedule time, and, of course, Moore knew that it was then due. The switch locomotive, with any cars which might be attached, ran irregularly, and this must also have been known by him. In an amendment to the complaint, made upon the trial, it was alleged that this smoke was in such quantities as to completely obscure a view of the train, which ran over the deceased soon after it started backward, and so completely filled the excavation in which the tracks were that it "entirely obscured the view of any object in said" excavation. And the evidence justifies the statement that though it was in the daytime, the settling smoke made it intensely dark under the bridges, and for some distance easterly thereof, after the passenger train passed, and until the smoke lifted from the ground. In fact, while it was usual for the smoke to collect and settle in this locality, it was much more than ordinarily dense on this occasion,—so dense, according to the evidence, as to fully confirm the allegation referred to that the smoke "entirely obscured the view of any object" in the excavation. Counsel for appellant urges that the evidence wholly failed to show any act of negligence upon the part of appellant, upon which the verdict can be sustained, and also that it conclusively established such contributory negligence upon the part of Moore as would preclude recovery, which contention, on a review of the evidence, is sustained.

Although it was emphatically denied on the trial by defendant's witnesses, there was evidence produced by plaintiff tending to show that it was the custom, when backing trains in this yard, to have a

brakeman upon the leading car; one of his duties being to watch out for pedestrians along the tracks, and to warn them of the danger. But assuming this to have been the custom, of what value to Moore would have been a compliance with this custom? Of what service could a brakeman, stationed upon the top of the approaching car, have rendered him as the train backed down through smoke which so completely enveloped every object that all were invisible? The brakeman could not have seen Moore upon the track, and consequently could not have warned him of the danger. Although walking towards it, Moore could not, and evidently did not, see the train in time to escape. He had probably stepped over on the mill lead track to avoid the passenger train, and was walking there in the intense darkness. Taking the uncontroverted evidence as to the circumstances and conditions, how can it be said that it was negligence to back the train without stationing a man upon the furniture car to look out for persons on the track, or that the failure to have a brakeman in that place caused Moore's death? A score of men upon the car would have been of no service to him so long as they depended upon their eyesight alone, and nothing but a light sufficiently large to penetrate the gloom, or a noise which would have reached his ears and notified him of the coming train, would have given him an opportunity to escape. The absence of the brakeman from the car, the disregard of the alleged custom, did not operate in any degree to the result. The presence of a brakeman there, and a strict observance of the custom, would not have afforded the slightest protection to the unfortunate man. His death was one of the distressing casualties which will come to those employed in the extremely hazardous business of yard switching, although every known precaution be taken. It seems to us that, from the evidence, it conclusively appeared that the failure to observe the custom we have referred to did not contribute to or cause the accident. When it is established, upon the trial of a case, that a custom in regard to the operation of trains, designed for the protection of employees, has been unobserved and disregarded, but it appears conclusively that an observance of the custom would have been of no service or value in the particular case, a verdict for damages cannot be based solely on the failure to observe this custom.

Judgment reversed.

Opinion by COLLINS, J.

BURAU V. GREAT NORTHERN RAILWAY COMPANY.

Supreme Court, Minnesota, February, 1897.

WHEN VERDICT WILL BE SET ASIDE.—Where, in an action to recover damages for the death of a person due to alleged negligence of a railway company while the deceased was driving across a railway track, the evidence indisputably shows that the injured party failed to exercise ordinary care, the verdict for plaintiff will be set aside and judgment rendered for defendant.

APPEAL from judgment setting aside verdict for plaintiff and ordering judgment for defendant in the District Court, Clay County. The facts appear in the opinion.

F. D. LARRABEE, for appellant.

M. D. GROVER and C. WELLINGTON, for respondent.

START, C. J.—About midnight of December 22, 1895, the plaintiff's intestate, while driving in an open buggy drawn by a pair of horses along a public highway which crosses the defendant's railway tracks near Carlisle, this State, was struck and killed by one of the defendant's passenger trains, and this action was brought to recover damages for his death. Verdict for the plaintiff for \$5,000; but the trial court, on motion of the defendant, ordered judgment for it, notwithstanding the verdict, pursuant to Gen. Laws, 1895, ch. 320, upon the ground that it conclusively appeared from the undisputed evidence that the deceased was guilty of contributory negligence. Judgment was so entered, from which the plaintiff appealed.

The evidence would sustain a finding that the defendant was negligent in not giving any signal of the approach of the train to the highway crossing, and the only question for review is, whether the undisputed evidence so clearly establishes the contributory negligence of the deceased as to justify the trial court in so holding as a matter of law. The evidence in this case justifies no other conclusion than that the deceased might have avoided the collision by the exercise of ordinary care. He was familiar with this railway crossing, having driven over it a number of times. Westerly from and commencing near the crossing was a cut six feet in depth in the deepest part thereof. The center of the headlight of the locomotive drawing the train in question was 10 feet, 1 7-8 inches from the top of the rail, and the diameter of the headlight was 22 1-2 inches.

The headlight and the lights from the car windows of the train could be seen, when passing through the cut, at any point along the highway, by a person seated in a buggy, for a distance of 132 feet southerly from the crossing, the direction whence the deceased was approaching the crossing at the time of the accident. These facts are established by undisputed evidence which seems to be entirely trustworthy. The deceased knew the location, and that he was approaching a place of danger, and it is obvious that, if he had been careful and vigilant in looking out for the approaching train, he must have discovered it in time to have avoided it.

Judgment affirmed.

WULFF v. WALTER A. WOOD HARVESTER COMPANY.

Supreme Court, Minnesota, February, 1897.

EMPLOYEE INJURED BY MACHINERY — CONTRIBUTORY NEGLIGENCE.—Where plaintiff was injured by machinery, and the evidence showed that he was an experienced workman, but that the accident in question was clearly the result of his own carelessness, the action was properly dismissed.

APPEAL from District Court, Ramsey County, from order dismissing action and denying motion for new trial.

S. L. PIERCE and B. F. LATTA, for appellant.

WARNER, RICHARDSON & LAWRENCE, for respondent.

At the time of the injury defendant was engaged in manufacturing agricultural implements at its factory in St. Paul. It is alleged that the injury was caused by reason of the negligence of the defendant in furnishing the plaintiff a defective double-action machine operating a small circular saw. This machine consisted of a table, under which was a shaft to which was attached a pulley upon which the belt was thrown when not in use, and a drive pulley, to which the belt was transferred when the saw was started and required to be used. The circular saw in use at the time of the accident was so adjusted that it passed through an opening in the table so that the workman could use it instead of a hand saw. This was called the "repairing machine," and all the workmen in the shop had access to it. The plaintiff, while making doors, needed some wedges to drive the door together, and, for the purpose of getting these wedges, he made a pattern, and then, taking a block or piece of board, went to the machine, fixed the gauge so that he could slip

the block between the saw and the gauge, and, holding the pattern in the right hand and the block in the left, he pressed down on the saw with the block so as to make the saw start and move towards him. As he pressed the block upon the saw, it started, struck the block, drew his hand on the saw, and, before he could withdraw it, it cut off four of his fingers. At three or four different times within two weeks preceding the date of this injury plaintiff had operated this machine, and was shown how to do so by one of the workmen in defendant's employment, to whom the foreman of the factory had sent him for that purpose. This workman showed him that by taking a stick, and touching the point of the saw teeth with it, and pressing down lightly, the saw would start readily. This was the usual way of starting the saw by the workmen who used it for short jobs, and some of them used it for an hour or more at a time. No accident or injury had occurred before from this method of using it, and the workmen did not regard its use in this manner as dangerous. The plaintiff, at the time of the injury, was forty-three years old. About sixteen years ago he came to this country, and has worked more or less at his trade as a carpenter up to the time of the injury. From his knowledge of the machinery of this kind, its use, and its dangers, the conclusion is irresistible that the plaintiff was injured by his own contributory negligence. He was neither young nor a novice in his knowledge of the use of machinery of this kind and its attendant dangers. There was an easy and obvious way of applying a stick to the saw, without the danger of the hand being drawn down in contact with the saw when it started. The accident must have resulted either from plaintiff's applying the block to the saw in a negligent manner, or from his voluntary assumption of obvious danger, and in either case he cannot recover. The block or board which he held was a small one,—only four to six inches wide and about five inches long,—and easily cut or displaced by a revolving circular saw. It was not the manner in which he was required, or which was necessary, to hold the block to make the wedges, that caused the injury, nor was it the customary way in which they were sawed, but the block was used for an entirely different purpose, viz., to start the saw. Had he used a stick, as directed, or not pressed so hard upon the block, the injury would have been avoided. If he had kept his hand out of the line of the saw when pressing upon the block, no accident would have occurred. Or even if he had used the block in a careful manner in starting the saw, his hand would not have been caught. While employees who use dangerous machinery should be held to a strict accountability in case of their negligence, the employee must at least use ordinary care in avoiding obvious dangers.

The trial court was justified, upon the plaintiff's own evidence, in dismissing the action, and the motion for a new trial was therefore properly denied.

Order affirmed.

Opinion by BUCK, J.

ILLINOIS CENTRAL RAILROAD COMPANY v. GUESS.

Supreme Court, Mississippi, January, 1897.

ENGINEER INJURED BY RUNNING ENGINE INTO OPEN SWITCH.—

An engineer who was aware of the insufficiency of the headlight of his engine, of the absence of air brakes and the incompetency of his firemen, was in duty bound to use the greater care in approaching stations with switches, and was guilty of contributory negligence that precluded recovery for injuries received in running his train at the rate of thirty miles an hour on a foggy night into an open switch at which there was no light displayed when he knew that the absence of a light at a switch was a signal of danger.

APPEAL from judgment of Circuit Court, Lafayette County, entered on verdict for plaintiff in action by William Guess for personal injuries caused by defendant's negligence.

MAYES & HARRIS, for appellant.

W. V. SULLIVAN, for appellee.

The plaintiff was an extra engineer in defendant's employ, and before starting on his trip with a freight train ascertained that an incompetent fireman would be assigned him, and when he objected was told that he had to take that fireman or be discharged. He also ascertained that the engine had no air brakes, and had an insufficient headlight. When he was approaching the station where the accident occurred, he was going a little less than thirty miles an hour. It was a foggy morning and in the night-time and he could hardly see at all by the headlight. Just about the time he got within a car length of the switch, he saw the switch was wrong, blew for brakes, and reversed the engine, but not in time, and it ran into the switch, jumped the tracks and caused very serious injury to him. There was no light at the switch and no switchman at the station, and it was the duty of the company to have had both. He saw no light as he was approaching the station, and he was familiar with the rule that a signal imperfectly displayed, or no signal displayed, must be regarded as a danger signal, and that it was his duty in such a case

to stop his train. The knowledge of the insufficiency of the headlight, the absence of air brakes, and the incompetency of his fireman devolved upon him the duty to use greater care in approaching stations with switches. Under the circumstances, he did not exercise ordinary prudence. It is immaterial how negligent the company was, so far as the facts of this case develop, because, with the exercise of ordinary prudence, there would have been no accident whatever. Sec. 193 of the Constitution, and also sec. 3559 of the Code, expressly except engineers and conductors from the provision that knowledge by an injured employee of the defective condition of the machinery shall be no defense. This court has announced that employees, not conductors or engineers, must use ordinary care to avoid injury. *Buckner v. Railroad Co.*, 72 Miss. 873, 18 Southern, 449.

Judgment reversed.

Opinion by CALHOON, Sp. J.

WATERS v. MOBILE AND OHIO RAILROAD COMPANY.

Supreme Court, Mississippi, February, 1897.

CATTLE INJURED—PRINCIPAL AND AGENT—RIGHT TO SUE.—

Where a shipper of cattle sued on his own behalf and as agent for others, for damages to stock occasioned by defendant's negligence, his right to sue in tort for damages to his own stock was not waived by suing as agent for others.

FROM a judgment dismissing action in the Circuit Court, Monroe County, plaintiff appeals.

GILLEYLEN & LEFTWICH and GEORGE C. PAINE, for appellant.

SYKES & BRISTOW, for appellee.

On February 11, 1896, William Waters chartered an emigrant car at Shipman, Ill., to be run by the Chicago & Alton Railroad to East St. Louis, and from there to Aberdeen, Miss., over the Mobile & Ohio Railroad, paying for the through trip in advance. The car was loaded with two horses and one colt belonging to William Waters, and two mules belonging to F. R. Kahl, and three horses belonging to Gus Smithpot, and household and kitchen furniture belonging to all of them. William Waters signed a regular live-stock shipping contract with the Chicago & Alton Railroad at Shipman, Ill., and at East St. Louis he signed another such contract with the

Mobile & Ohio Railroad, covering the trip of said car from East St. Louis to Aberdeen, Miss., in which contract he appears as shipper, owner, and consignee, which he swears he did not know he would be required to sign until he was ready to start, but had to sign, or not go. On the car, with the stock and goods, came the owners. On their arrival at Aberdeen a day late the car was side-tracked, and Waters and the other owners took their stock and goods out, in, as they claimed, a damaged condition, and so informed the agent at Aberdeen at the time. Failing to effect an amicable settlement, suits were brought before a justice of the peace in Aberdeen against the Mobile & Ohio Railroad Company, as follows: William Waters sued for damage to his two horses and one colt, demanding damages to the amount of \$130. William Waters, agent for Gus Smithpot, sued for damage to Smithpot's three horses and a stove, demanding \$50. William Waters, agent for F. R. Kahl, sued for damage to the two mules of Kahl, demanding \$90. Judgment was rendered in each case for the amount of the demand, and the defendant, the Mobile & Ohio Railroad Company, took an appeal in each case in the Circuit Court of Monroe county. At the September term, 1896, of said court, the case of William Waters *v.* The Mobile & Ohio Railroad Company was called for trial, and the parties proceeded with the trial, and introduced a large volume of testimony before the jury, including the appeal papers in the other two cases; and then, after the testimony was all in, defendant moved the court to dismiss the cause, for "want of jurisdiction in the J. P. court, because plaintiff had split up his cause of action" into three suits. The court sustained the motion, dismissed the cause, and taxed plaintiff with all the costs, and plaintiff appealed.

It is claimed by appellee that there is no intimation of gross or wilful negligence in the case. The suit was commenced without pleadings, in Justice of the Peace Court, however, and charges of gross negligence did not appear, except in the testimony introduced on the trial, from which, if true, the jury would be justified in believing there was wilful negligence. There must have been great negligence somewhere, as some of the animals were partly flayed upon arrival at Aberdeen, and two died almost immediately.

There is no dispute and no question that William Waters could sue for injuries to his own property. He was owner, shipper and consignee, and his demand was within the jurisdiction of the justice of the peace, and, had he not sued as agent for Smithpot and Kahl, the motion to dismiss would not have been made. The only question remaining, then, is, did he lose his own right to sue by suing as agent for the others? It is insisted by counsel for appellant that appellant

could not have brought a single action, for he could not have asserted in his complaint that he was owner of all the stock, for he was not, and could not have sued as bailee for all, for he was owner of part, and he could not join a count as owner of part and as bailee of part, and, in fact, he was no longer bailee at all, for the owners had possession, and he was not at all injured by the damage to the stock of the other owners, nor interested in recovery for it (1). Had he brought such suit, he would have been met with the defense that only the owners were damaged, and had the only right to sue, and the defendant wanted to interpose different defenses to the suits of different plaintiffs. The tort for which plaintiff sues in this case was the injury to his own stock. He had no interest in the stock of the other men after they took possession, and each had a right to sue for damage to his stock, or not sue, as he might determine for himself. That conclusion reached, the question as to whether the other suits were properly brought by Waters as agent, or can be maintained, is not before this court. As to this appellant, we can see no just grounds upon which he can be deprived of a trial of his own cause.

Judgment reversed.

Opinion by STOCKDALE, J.

YAZOO AND MISSISSIPPI VALLEY RAILROAD COMPANY v. WHITTINGTON.

Supreme Court, Mississippi, February, 1897.

HORSE KILLED ON TRACK—WHEN NOT NECESSARY TO STOP TRAIN.—Where a horse, drinking at a pond about twelve feet from a railroad track, ran up a bank ten or twelve feet high, and got in front of a moving train and was killed, it was held that it is not required that a train be stopped, nor its speed checked, because animals are discovered near a track.

APPEAL from judgment for plaintiff in the Circuit Court, Jefferson County.

MAYES & HARRIS, for appellant.

C. S. COFFEY, for appellee.

Appellee recovered judgment for \$60, the price of a horse killed by appellant's train. The horse was drinking from a pond, about

1. The court cited *Baughman v. Railroad Co.*, 94 Ky. 150; 21 S. W. Rep. 757, the facts of which case are nearly identical with those in the case at bar. See, also, *Hall v. Fisher*, 20 Barb. (N. Y.) 441.

twelve feet from the railroad track, and when he heard the train coming, he threw up his head, jumped upon the track, turned down it, ran in front of the engine about thirty yards, was knocked off and killed. The evidence generally showed that the train was about coming out, or had just come out, of a cut about 40 or 50 yards north of the pond where the horse was drinking and the place where he ran upon the track, the embankment being 10 or 12 feet high, and the distance from where the horse jumped upon the track to where he was killed was estimated to be 20 to 30 yards. The engineer testified that the grade was slightly descending, and he could not have stopped his train under 300 to 350 feet (which was the distance witnesses testified he might first have seen the horse at the pond); that as soon as the horse got upon the track, he put on brakes with full force and cut off steam to lower the speed, and blew the whistle. It does not seem to have been claimed that the train could have been stopped after the horse got upon the track, before it struck him. The verdict was probably based upon the fact that the train might have been stopped between the point where the engineer might have observed the horse drinking at the pond, but appellant was not liable unless its servants failed to use proper efforts after the horse mounted the track. The engineer could not be held to anticipate that a horse drinking at a pond would run up a bank 10 or 12 feet high, right in front of a moving train. It is not required that a train be stopped, nor its speed be checked, because animals are discovered near the track (1). Appellant's servants did all they could to avoid the accident.

Judgment reversed, and new trial granted.

Opinion by STOCKDALE, J.

1. "It is not the duty of the engineer to stop his train, until there is an apparent necessity for it. Ordinarily, the discovery of animals or persons near the road does not require the stopping of the train." *Railroad Co. v. Brumfield*, 64 Miss. 637, 1 Southern Rep. 905; *Railroad Co. v. Thornton*, 65 Miss. 256, 3 Southern Rep. 654. "Unless appearances really indicate danger of their going upon the track,

neither the stoppage nor an effort to stop the train is required. Rapid movements and regular connections are among the chief advantages of transportation by railroads. This is a duty they owe to the public; and if a train must stop or check up whenever an animal is near the track, such duties could not be properly discharged." *Railroad Co. v. Bourgeois*, 66 Miss. 3, 5 Southern Rep. 629.

JONES V. MEMPHIS AND ARKANSAS CITY PACKET COMPANY.

Supreme Court, Mississippi, February, 1897.

ANIMAL INJURED — DIRECTING VERDICT — ERROR. — Where there was evidence tending to show that a jack was injured, while in transportation, by the carrier, a direction of verdict for defendant was error, as the question was for jury.

APPEAL from judgment entered for defendant in the Circuit Court, Coahoma County.

D. A. SCOTT, for appellant.

J. W. CUTRER, for appellee.

In February, 1895, appellant delivered a jack to appellee at Malone's Landing on the Mississippi river, to be transported to Memphis, Tenn., and paid the fare demanded. The jack was in bad condition when it reached Memphis, and died a short while afterwards. At the trial appellant introduced evidence that the jack was delivered to appellee; that the approach and landing were slippery and unsafe; that it was a cold morning and ice had formed on the ground leading from the bank of the river to the landing, and that when appellee's hands attempted to put the jack on the boat it refused to be led on the stage-plank. The stage-plank was lowered by the hands and rested on the bank of the river at an angle of about forty degrees. The stage-plank was constructed so as to leave the flooring of the plank four or five inches from the ground, thus leaving an opening without any protection whatever. The jack was pulled and forced, by appellee's hands, down the embankment to the stage-plank. In the struggle the jack was badly bruised and maimed. When he was delivered to the carrier the jack was in good condition, but on arrival at his destination, he was so maimed that he died within a few days. The court gave a peremptory instruction to find for defendant, and a motion for a new trial being overruled, plaintiff appealed.

It was error to exclude plaintiff's testimony and give the instruction directing verdict for defendant. There was sufficient evidence to go to the jury, and it was a case peculiarly for them to decide upon the facts.

Reversed.

Opinion by WHITFIELD, J.

SOUTHERN RAILWAY COMPANY v. HUNTER.

Supreme Court, Mississippi, February, 1897.

EJECTING TRESPASSER FROM MOVING TRAIN.—Where a flagman ejects a trespasser from a train while it is in motion, the railroad is liable.

APPEAL from judgment rendered for plaintiff in the Leflore County Circuit Court.

YERGER & PERCY, for appellant.

COLEMAN & SOMERVILLE, for appellee.

It appeared from the facts that on September 14, 1894, plaintiff, a negro boy about fourteen years old, was ejected from a train on which he was seeking a free ride, and was struck by a train coming in the opposite direction, having been put off while the train was in motion. The flagman of the train having discovered the plaintiff, signaled to stop the train for the purpose of ejecting him, and put him off before the train stopped. It very clearly appeared from the flagman's testimony that he had a duty to perform for the master in regard to trespassers found on the train, to wit: "to carry them to the conductor," and, if the conductor told him to put them off, "to pull the engineer down, stop the train, and put them off." The railroad company was liable for the acts of its servant (1).

Judgment affirmed.

Opinion by WHITFIELD, J.

MOBILE AND OHIO RAILROAD COMPANY v. WEEMS.

Supreme Court, Mississippi, February, 1897.

COLLISION BETWEEN TRAIN AND HORSE.—Where the facts were undisputed that the engineer did all that was possible to avoid a collision between his engine and a horse on the track, a verdict for plaintiff was not justified.

APPEAL from judgment rendered for plaintiff in the Circuit Court, Clarke County.

A. J. RUSSELL, for appellant.

J. A. ANDERSON, for appellee.

1. Distinguishing the case at bar from the cases of Railroad Co. v. Latham, 72 Miss. 32, and Williams v. Railroad Co. (Miss.), 19 Southern Rep. 90.

Appellee (plaintiff below) recovered judgment against appellant (defendant below) for the sum of \$90, value of a horse killed by defendant. The only question here — the defendant being *prima facie* liable — is, did the servants of defendant “use all reasonable effort to avoid the killing of the horse in question?” The horse walked out of Mr. Weems’ lot to the railroad track, and walked all the way to the trestle — 250 yards — and into the trestle, and got his front feet down upon the ground between the ties, and the ground was two feet below the planks or ties; and it seems strongly probable from the testimony of three of the witnesses that the horse was struck and killed in that position. The hind feet of the horse were at the north end of the trestle, with his head south. The train came from the south. The train gave a signal — a long whistle — and made a sufficient noise to attract the horse’s attention. The engineer testified that he could not have stopped the train in less than 250 or 300 yards. The servants of the company appear to have used all reasonable efforts to prevent the accident, and the railroad should not be held liable.

Judgment reversed.

Opinion by STOCKDALE, J.

GRANEY ET UX V. ST. LOUIS, IRON MOUNTAIN AND SOUTHERN RAILWAY COMPANY.

Supreme Court, Missouri, Division No. 1, February, 1897.

BOY KILLED BY TRAIN — UNLAWFUL SPEED.— Where a boy, twelve years old, was standing on a city crossing alongside of the defendant’s railroad track, and a train came along at an illegal rate of speed, causing the boy to be drawn thereunder and killed, such unlawful speed authorizes a recovery unless contributory negligence is shown.

STANDING NEAR TRACK.— It cannot be said, as matter of law, that a boy twelve years old is guilty of contributory negligence in standing near a track while a train is passing.

SUCTION CREATED BY PASSING TRAIN — INSTRUCTION.— An instruction that deceased was not negligent if he stood a sufficient distance from the track to avoid being struck by a passing train is error, as it ignored the cause of the injury, namely, the disturbance of the air produced by the speed of the train, and the danger to a person near the track of being thrown down thereby.

APPEAL by defendants from judgment for plaintiffs rendered in the Circuit Court, St. Louis County.

MARTIN L. CLARDY and HENRY G. HERBEL, for appellant.

W. B. THOMPSON, for respondents.

Action by plaintiffs, husband and wife, to recover the statutory damages of \$5,000 for the death of their minor son, James Graney, caused, as alleged, by the negligence of the employees of defendant in running one of its freight trains in the city of St. Louis. The petition charges, in substance, that on January 18, 1891, there were in force three valid ordinances in the city of St. Louis,—one prohibiting any car or cars, or locomotive, propelled by steam power, to be run at a rate of speed exceeding six miles per hour; another requiring such locomotive to ring a bell constantly while running within the city limits; and the third imposing a penalty for violation of either of the other two. The petition then charges the circumstances under which the son of plaintiff was killed substantially as follows: The said James, the infant son of plaintiffs, was on January 18, 1891, standing upon the crossing of Dorcas street, in the city of St. Louis, alongside the track of defendant's railway, and at a sufficient and proper distance away from said track, and away from the locomotive and cars operated by defendant, when the servants of defendant, without warning, recklessly, negligently, and at a speed prohibited by an ordinance of said city, ran a train of freight cars over said track, by reason of which their said son fell and was sucked under the wheels of the cars, and was thereby killed. The only negligence charged is the violation of these ordinances. Defendant answered by a general denial and a plea of contributory negligence. It also averred that said ordinances, regulating the speed of trains, had been repealed, since the death of James Graney, by an ordinance limiting the rate of speed to twenty miles per hour. On the trial the ordinances pleaded were read in evidence. It was admitted that James Graney was killed on January 18, 1891, by being run over by a train of freight cars operated by defendant, and that he was the minor son of plaintiffs. It was shown that, on the date mentioned, defendant controlled and operated a railroad, a portion of which was located in the city of St. Louis. It has two tracks, running north and south, which cross Dorcas street at right angles. This street runs east and west through the city. On Sunday afternoon, January 18, 1891, James Graney, then eleven years and nine months old, and four other boys, who were from one to two years older, came down Dorcas street from the west, intending to cross the railroad of defendant. When close to the track, a train of twenty-three freight cars, drawn by an engine, came onto the crossing from the south in front of them. The engine bell was not ringing, and the train was running twenty or twenty-five miles per hour. The

boys stopped at various distances from the track to await the passage of the train. James Graney stood between the two tracks, two or three feet from the west rail of the east track, upon which the train was passing. When about half or two-thirds of the train had passed, he was seen to whirl around, and fall upon the ground, and roll over. In rolling, his legs got upon the rail, and the cars passed over them. From this injury he died on the next day. There was no material conflict except as to the speed of the train and giving the signals. No witness gives the speed of the train at less than six miles per hour. The other boys who were with deceased testified to a speed of over twenty miles per hour. At the close of all the evidence defendant's counsel asked the court to give an instruction in the nature of a demurrer to the evidence, which was refused. Was the demurrer to the evidence properly denied? First, was defendant's negligence the proximate cause of the injury? Under the ordinance in force in the city of St. Louis, defendant was negligent in running the train at a rate of speed in excess of six miles per hour. The negligence being established, defendant is liable for all the consequences directly resulting therefrom, though the particular injury might not have been anticipated. In case the negligence is admitted, or otherwise proved, and the injurious consequences are immediate, and flow directly from the negligent act, the person guilty of the act will not be excused for the reason that the particular consequences were unusual, and could not, ordinarily, have been foreseen. Proof of negligence, and of injury directly resulting therefrom, makes, *prima facie*, a case for damages. 16 Am. & Eng. Enc. Law, 422. It is well known, from common observation and experience, that a moving train or other body creates a movement of the air near it in the same direction. The force of the current of the air is increased with the increased velocity of the moving object. A rapidly moving train carries the air along with it with such velocity and force as to tend to move or overthrow one standing very near to the track. The evidence tends to prove that James Graney was standing within two or three feet of the track as the train passed him. When about half the train had passed, he was observed to turn and fall in the direction in which the train was moving, and to roll over on the ground; his legs thereby going upon the rail. An inference may be reasonably drawn from these facts that he was thrown down by the force of the current of air caused by the unlawful speed at which the train was run. We have, therefore, evidence tending to prove negligence in operating the train, and that the death of the boy was the immediate consequence thereof. These facts, if found by the jury, would authorize a recovery, unless

negligence can be attributed to the boy in voluntarily standing so near the running train as to be thrown down by the wind created thereby.

Deceased saw the train, and, standing as he was by the side of it, knew its rate of speed was unlawful, or at least, he was not entitled to indulge the presumption that it was running less than six miles per hour. If an injury had been suffered by a person *sui juris* in the same circumstances and for the same cause, we could not hesitate to declare his conduct in standing so near the track such negligence as would preclude a recovery. But a boy of twelve years is only required to exercise the degree of care commensurate with his intelligence, experience, and knowledge, and is only chargeable with contributory negligence according to the same rule. Whether, in a particular case, his concurring negligence will defeat a recovery, is generally, but not always, a question of fact, to be determined by the jury. Where it appears that a boy of such age has knowledge of the danger of doing an act, and sufficient intelligence to avoid it, and nevertheless voluntarily does it, and is injured thereby, he will be chargeable with contributory negligence as a matter of law. The fact that he was reckless in the face of the danger should no more excuse him than the same characteristic would excuse an adult person. *Payne v. Railroad Co.* (Mo. Sup.) 38 S. W. Rep. 308; *Spillane v. Railroad Co.* (Mo. Sup.) 37 S. W. Rep. 198; *Ridenhour v. Kansas City, etc. R. R. Co.*, 102 Mo. 270, 4 Am. Neg. Cas. 634, 13 S. W. Rep. 889, and 14 S. W. Rep. 760, 4 Am. Neg. Cas. 644. We do not think that it conclusively appears, from the mere evidence of the age of deceased, that his knowledge was sufficient to justify the court in declaring, as a matter of law, that he knew the danger of his negligent act, and the jury was properly left to determine whether, in the circumstances, contributory negligence should be imputed to him. We are of the opinion that the trial court did not commit error in refusing the demurrer to the evidence.

An instruction, which in effect tells the jury, as a matter of law, that deceased was not negligent if he stood a sufficient distance from the track to avoid being struck by the locomotive and train passing upon it, is misleading, as it ignores the very cause which produced the injury, namely, the disturbance of the air. A prudent person would stand far enough away from the track to avoid the dangerous effect of the wind produced by the train. Whether a boy could stand nearer a train than common prudence would dictate in the case of an adult person, and avoid the effect of his conduct if injured, would depend upon whether contributory negligence could be imputed to him. The degree of care required of a boy is not

different from that required of a man, if the former is chargeable with contributory negligence at all. The act of deceased in voluntarily taking a position so near the train as to be thrown down by the disturbance of the air was a negligent act, and the jury might properly have been so instructed. He had no right to presume that the train was running at less speed than six miles per hour, when he could see that it was moving much faster. His companions knew that it was running over twenty miles per hour, for they all testified to the excessive rate of speed. The only question in the case, then, would be whether deceased had knowledge and understanding of the danger he incurred in taking a position within two or three feet of this train, and trying to stand there while it passed him.

Two witnesses were called as experts, and were permitted to give their opinion as to the effect the current of air produced by a freight train running at the rate of twenty miles per hour would have upon a boy weighing sixty-five pounds standing within two or three feet of it. These witnesses were allowed to detail, in chief, to the jury, their observation of the effect of the air upon mail sacks thrown from running trains. This evidence was entirely irrelevant to any issue on trial. It did not even correctly illustrate the question in issue. An object thrown from a train while in motion is carried forward by the momentum of the train, as well as by the current of the air, and the effect of the current on them might not be the same as that produced upon a stationary object. The court should not have permitted these witnesses, on examination in chief, to detail to the jury the result of these experiments.

Judgment reversed.

Opinion by MACFARLANE, J.

WINKLER v. ST. LOUIS BASKET AND BOX COMPANY.

Supreme Court, Missouri, Division No. 1, January, 1897.

MASTER AND SERVANT—EMPLOYEE INJURED BY BRAKE—RISKS OF EMPLOYMENT.—Where an employee was injured by the failure of a brake to perform its work on a flat car, and it was shown that the employee had been engaged in managing the car and knew the style of brake used for a long period, he cannot recover for negligence of the company in failing to supply another kind of brake, as his injury resulted from the risks of his employment.

APPEAL from St. Louis Circuit Court, where verdict for plaintiff was set aside.

J. HUGO GRIMM, for appellant.

J. D. JOHNSON, for respondent.

Action commenced by Emelie Winkler, as widow of Louis Winkler, to recover damages for the death of her husband on account of the alleged negligence of defendant. A trial resulted in a verdict for plaintiff, which, on motion of defendant, was set aside, for the reason as given, "that the court refused to grant, at the end of the entire case, an instruction, as prayed by defendant, that, under the pleadings and evidence, the plaintiff was not entitled to recover." From this order plaintiff appealed. Pending the appeal said plaintiff has died, and the appeal is prosecuted in the name of her administrator.

Defendant's factory was located about 1,000 feet from the river. It had a rail or tramway, from the factory to the river, on which it ran a flat car for the purpose of conveying logs from the river to the factory. This car was about twelve feet long, six feet wide, and twenty inches high. The wheels were about eighteen inches in diameter. Four pieces of strong oak timber were securely bolted across the top of the car at regular intervals, and projected about eight inches beyond the outside of the car, and four inches beyond the wheels. There was an incline downward from the factory to the river. The car, when loaded with logs, was drawn from the river bank to the factory by means of a cable, one end of which was attached to the car, and the other end to a drum at the factory, and the car was drawn up by steam power. It was carried back to the river by its own momentum. For the purpose of regulating the speed of the car when going down grade, defendant had provided a piece of timber, or shaft, five feet long, and four and one-half inches thick at one end, and tapering to two inches thick at the other end. At the thick end of this shaft a block twelve inches long and three inches thick was securely nailed, and this was covered with a leather shoe. The shaft extended beyond the block about six inches. The brake was used by putting the block end in a slanting direction between the right fore wheel and the projecting end of the cross timber, immediately in front of and above the wheel, until the shoulder on the end and upper side of the shaft caught against the end of the cross timber, and by then pressing down on the handle of the shaft, so as to press the leather shoe against the face of the wheel. Louis Winkler had been employed to assist in operating this car for three years, during which time this character of brake had been constantly used. The brake in question was made by him. On the day of Winkler's injury and death, plaintiff and three others were engaged in loading and operating this car. Winkler was, and for

eighteen months had been, foreman in this work. In returning the car from the factory to the river, deceased was sitting on a coil of rope at the front end of the car. A wheelbarrow was run onto the track in front of the car, which made stopping or checking its speed necessary. Winkler, who was most convenient, undertook to use the brake shaft. He placed the small end under his arm, and the block end he attempted to apply to the wheel in the usual manner, but, for some reason not explained, the upper end of the shaft was suddenly thrown upward, and Winkler was pitched over the end of the car, and was run over, and killed. The negligence charged in the petition is that "defendant failed and neglected to supply said car with a proper and suitable brake, which could be used with safety to stop said car, should it become necessary to do so; but defendant, instead of supplying said car with a suitable brake, provided a handle of wood about five feet long, upon which a block was attached, and which could be used for the purpose of stopping said car or braking its wheels only by reaching over the side of said car, and pressing said block firmly against one of said wheels." The answer in effect charges that the death of plaintiff's husband was caused by a risk which he assumed when engaging to do the work. Contributory negligence was also charged.

We are of the opinion that the court ruled correctly in setting aside the verdict of the jury, for the reason given.

When a servant knows the dangers he has to encounter, and still engages in the service, he has no ground for complaint if he receives injuries from such dangers. The rule in respect to the liability of the master for an injury to his servant caused by defective appliances has no application to the facts of this case, for there were no defects in the brake in question. To sum the whole matter up, deceased was doing the very work he was employed to do, and was using the kind of brake he impliedly agreed to use. His injury resulted from one of the ordinary perils of the service, the risks of which he assumed. *Gleeson v. Manufacturing Co.*, 94 Mo. 206, 7 S. W. Rep. 188; *Taylor v. Railway Co.*, 86 Mo. 463; *Price v. Railway Co.*, 77 Mo. 511; *Williams v. Railway Co.*, 119 Mo. 322, 24 S. W. Rep. 782.

Judgment affirmed.

Opinion by MACFARLANE, J.

LEE v. PUBLISHERS: GEORGE KNAPP & CO.

Supreme Court, Missouri, Division No. 1, February, 1897.

BOY KILLED IN ELEVATOR—NEGLIGENT RUNNING—DEFECTIVE ELEVATOR.—Whether it is negligence to permit an insufficiently guarded and defective elevator to be operated by a boy, whereby a passenger is in danger of injury, is a question for the jury. So held where a boy, twelve years old, was killed while attempting to alight from an elevator.

DAMAGES INSUFFICIENT—NEW TRIAL.—While verdicts will not ordinarily be disturbed merely for smallness of damages awarded, yet where the award is so clearly inadequate as in the case of a boy killed in an elevator shaft, the verdict being only one cent damages, the evidence showing a pecuniary loss to the parent from loss of wages and an outlay for funeral expenses, the trial court will be sustained in its granting order for a new trial.

APPEAL by defendants from St. Louis Circuit Court from an order granting plaintiff new trial.

A. & J. F. LEE, for appellant.

VIRGIL RULE and A. R. TAYLOR, for respondent.

Action by Elizabeth Lee for the death of her twelve-year-old boy, due to his falling down defendant's elevator shaft. From the evidence on the trial it appears that the recess in the wall of the elevator shaft at each floor, opposite the opening of the elevator, was three feet wide, sixteen inches deep, and eight feet high; that plaintiff's son was on the elevator, intending to go to the fifth floor; that, when last seen before the accident, he was standing in a corner of the elevator, next to the opening therein; that no one saw how he went out; that the elevator boy and another boy therein heard him shout, and then saw him lying with his body on the floor of the recess in the wall at the fourth floor with one foot in the elevator, the floor of which was then above the floor of such recess; that before he could be reached he slipped under the elevator, and fell down the shaft; that when the elevator was stopped the floor thereof was three and one-half feet above the floor of the recess; that the elevator boy thought that, if he had been looking at him when he fell, he could have stopped the elevator in time to have saved him; that he and the other boy stated that they supposed deceased started to step out at the fourth floor, thinking the elevator had reached the top or the fifth floor.

Defendant prosecutes this appeal from an order setting aside verdict and judgment for plaintiff for one cent damages, and granting new trial, contending that plaintiff had no cause to complain, as

the verdict, on the evidence, should have been for defendant in the first instance, and that its instructions for a nonsuit as prayed at the close of the case should have been given.

In passing upon an application to nonsuit the plaintiff, which is but a demurrer to the evidence offered in plaintiff's behalf, every inference of fact in favor of the plaintiff, from the evidence, which the jury might have inferred with any reasonable degree of propriety, the court must indulge. The evidence for the plaintiff was that this elevator, from which plaintiff's son fell, was used chiefly, after six o'clock in the evening, for the purpose of conveying messenger boys, with dispatches and telegrams from the various news centers of the city to the office of the defendant, on the fifth floor of its building; that there existed, from the time the elevator started on its journey upward or downward, until it reached its destination, an unguarded space or opening in the cage, where passengers passed out into the recess in the wall of the elevator chute, before reaching the door that would permit them to pass into the open hallway leading to and from the elevator, into which persons riding in the elevator were liable to fall if they should stumble, or for any cause lose their balance, while the elevator was ascending or descending on its journey; that the motion of the elevator was unsteady; that it had an unusual lateral vibration, which would cause it to shake "hard, very hard," or "it shook a terrible lot," to use the language of the boy, Willis, who was riding with plaintiff's son at the time he met his death; and that at the time of the accident the elevator was in charge of, and being operated by, a boy of only fifteen years of age, who, according to his own testimony, was at the time of this accident looking up at a knot in the elevator rope, and was only attracted to the position of plaintiff's son in the open recess in the wall of the elevator chute by his cry for help. While jurors might differ in their conclusions upon these facts, we think it could not be said that they would be wholly unwarranted in drawing an inference of negligence therefrom. If, then, the trial court committed no error in submitting the case to the jury upon the facts as shown, has it erred in setting aside the verdict of the jury as rendered? This court has always held that the granting of a new trial rests peculiarly within the discretion of the trial court, and that, as this court will not undertake to estimate the comparative value or weigh the force of all the conflicting testimony offered at the trial, it is a high and imperative duty, as well as a discretion, that trial courts should never hesitate to exercise, in the interest of fairness and honesty, where verdicts have been brought about through bias, prejudice, or partiality, miscalculation upon or misunderstanding of the testimony,

to grant new trials, that injustice may be prevented, and a literal "*verdictum*" be recorded, and that this court will not interfere with the exercise of that discretion unless it plainly appears that it has been arbitrarily or unreasonably exercised. The insertion here of the reasons, in part, assigned by the trial court at the disposition of the motion for a new trial, and the granting of same, is ample, in and of itself, to relieve it from the charge of having arbitrarily or unreasonably exercised its discretion in the premises. The court said: "By their verdict, the jury found that the boy's death was occasioned by the negligence of the defendant in respect to its elevator. Having so found, it became their duty, under the law, to ascertain the extent of plaintiff's injury and award them reasonable compensation therefor. They were instructed by the court that, if they found for plaintiffs, they should assess their damages at such sum as they might believe from the evidence would be a fair compensation for the loss of the services of their son from the time of his death until he would arrive at the age of twenty-one years, less the cost of his support, and also the necessary expenses incurred for his funeral and burial, not exceeding \$5,000. And yet, in face of the instructions of the court, and uncontradicted evidence showing a net profit of \$12 per month to plaintiffs from his wages, an actual outlay by them of \$150 for his funeral, the jury assessed the damages sustained by these parents in the loss of the services of their son at the sum of one cent. In cases of this nature the general rule is that verdicts will not ordinarily be disturbed merely on account of the smallness of the damages awarded. But this rule is subject to the exception that where the damages are such as to induce the conviction that the verdict was the result of either passion, prejudice, or partiality, or that the jury have shrunk from deciding the issues submitted to them, the court should interfere."

Order and judgment affirmed.

Opinion by ROBINSON, J.

BUTZ V. CAVANAGH ET AL.

Supreme Court, Missouri, Division No. 1, February, 1897.

INFANT INJURED IN EXCAVATION—CITY—PROXIMATE CAUSE—CONTRIBUTORY NEGLIGENCE.—Where a boy is injured due to his going onto a dumping ground for the purpose of obtaining some wire, the said dump not being properly fenced, the city cannot be held responsible, as the injury was not due to falling into an excavation on the street, but to

trespassing on private property. Neither is the owner of the dump liable for the injury, as the boy voluntarily placed himself in danger.

APPEAL from judgment rendered for defendants in the Circuit Court, St. Louis County.

W. C. & J. C. JONES and C. C. KIDD, for appellant.

LUBKE & MUENCH and W. C. MARSHALL, for respondents.

Plaintiff, a minor, by his next friend, brought suit to recover on account of having his feet badly burned by reason of alleged negligence of defendants. The defendants are Timothy Cavanagh, the owner of an old rock quarry, the Cavanagh Construction Company, a corporation, and lessee of said quarry, and the City of St. Louis. An old quarry about sixty feet deep, and about one block in area, constitutes the dangerous property complained of. The property was surrounded on the east by Glasgow avenue, on the south by Madison street, on the west by Garrison avenue, and north by Magazine street. The wall of the quarry on Harrison avenue was nearly perpendicular, and was protected by a fence. Magazine street was only partially improved. From this street the quarry was used, by authority of the defendants, as a public dumping place for all kinds of debris gathered from streets, alleys and back yards. This was burned, and there were frequently smouldering fires therefrom. Along the street into the quarry the banks were steep, but sloping. Generally, a watchman was kept at this dump to direct the unloading of the debris thrown into it. There was no fence or other protection on this, the south, side of the quarry. Boys sometimes visited this dumping place to look for cans, wire, and other articles thrown out there. On September 9, 1893, plaintiff was twelve years of age, and lived with his parents about two blocks south of the quarry. He had, about two weeks before, been warned by his father not to go about the dump, as he was liable to get burned. On said day he and two companions were on Magazine street about its junction with Harrison avenue, and he saw, about the bottom of the embankment, some wire, which he concluded to get. He ran down the embankment, and about two-thirds of the way down stepped with both feet into a smouldering fire, or hot ashes, and, being barefooted his feet were severely burned. The watchman was not present.

Certain ordinances of the city were read in evidence defining nuisances and providing for their abatement, and requiring holes and other dangerous places to be properly inclosed with fences or walls.

The owner and lessee of the property are charged with negligence in maintaining a nuisance in a populous portion of the city, in failing to fence the quarry, and in permitting it to be used in such a manner as to

attract children into a place of danger from hidden fires. The city is charged with negligence in permitting a nuisance on the street, and in not requiring the hole to be fenced. After hearing the evidence of plaintiff, on intimation from the court that a demurrer to the evidence would be sustained, plaintiff took a nonsuit, with leave. A motion to set aside the nonsuit was overruled, and plaintiff appealed. Plaintiff was not injured by falling into a dangerous excavation on the street. When injured he was on private property some distance from the street, where he went voluntarily. Though the street may have been in a negligently dangerous condition, that was not the proximate cause of the injury. The city cannot, therefore, be held responsible for the injury on the ground of neglect to keep the street in proper condition.

Nor can the city be held responsible for injuries to private persons resulting from a failure to enforce its police regulations, which provide for the prevention and abatement of nuisances. *Harman v. City of St. Louis (Mo.)*, 38 S. W. Rep. 1102; 2 Dill, Mun. Corp. § 951. As to the city, the judgment was clearly right. In the case of *Harman v. City of St. Louis, supra*, it was held that one who builds a wooden structure in the city contrary to an ordinance prohibiting the erection of such buildings is liable to respond in damages to any one specially injured thereby. The general rule, in the absence of express law, is that one is not required to fence, or otherwise secure, his private property for the protection of strangers, unless the dangers therefrom are so near a public highway as to threaten the safety of persons exercising ordinary care in using the way. *Overholt v. Vieths*, 93 Mo. 424; *Witte v. Stifel*, 126 Mo. 303. But in case a statute, or valid ordinance, requires the owner to take such precaution, and he neglects or refuses to do so, the unprotected property becomes a public nuisance, and the owner will be liable as for maintaining a nuisance on his premises. *Harmon Case, supra*. But this ordinance is in derogation of a common right, and a failure to comply with its requirements should not be treated as a license to voluntary trespassers to go upon the property at will. It was evidently intended to protect those only who were lawfully using the public streets, and not those who voluntarily leave the street and go upon the property for their own convenience or pleasure. A fence would be no protection against such persons. These last remarks may not apply to persons *non sui juris*, who may wander upon the property, but we do not regard plaintiff as such a person. He was an intelligent, active lad of 12 years, who had been warned by his father of the danger of going into the excavation. He must be taken as voluntarily assuming the risk of injury in going down

the dump. The attraction of a piece of wire does not excuse the trespass.

Judgment affirmed.

Opinion by MACFARLANE, J.

MULLIGAN v. MONTANA UNION RAILWAY COMPANY.

FEATHERKILE v. THE SAME.

Supreme Court, Montana, February, 1897.

CONTRIBUTORY NEGLIGENCE—INSTRUCTION.—An instruction that if plaintiffs contributed to their own injury by their own negligence they cannot recover, even if defendant was negligent, states the law correctly.

APPLIANCES—INSTRUCTION.—An instruction that defendant was not bound to use the latest appliances, but only those reasonably safe, is not erroneous, where another instruction states that defendant was bound to use ordinary care to furnish safe appliances and to properly inspect same and keep in good repair.

MASTER AND SERVANT—INSTRUCTION.—An instruction stating that the engineer and fireman were fellow-servants, and if the fireman was injured by reason of the engineer's negligence he could not recover, was proper.

BOILER EXPLOSION—LATENT DEFECT.—Where plaintiffs were injured by the explosion of a boiler on an engine, they being, respectively, the engineer and fireman, the defendant could not be held liable for a latent defect in the machinery which ordinary care in inspection could not detect, and instructions to that effect were correctly given.

FROM an order in the Mulligan case made in the District Court, Silver Bow county, sustaining plaintiff's motion for a new trial, defendant appeals.

GEO. HALDORN, for appellant.

The respondents were not represented.

These cases were both for the recovery of damages for personal injuries. The plaintiff Mulligan was a fireman upon the defendant railroad company's road, and the plaintiff Featherkile was an engineer. Both were injured at the same time, and by stipulation of counsel for all parties the causes were tried together before the same jury, with the agreement that the jury should render separate verdicts. The plaintiff Mulligan's case is brought before the Supreme Court by appeal. The allegations of the complaint are that, on March 18, 1893, plaintiff was a fireman in the employ of the

defendant company; that, at about four o'clock A. M. of said day, while the engine upon which he was firing was about three-fourths of a mile from the point to which said engine was going, the engineer in charge stopped the engine to pack the piston upon the right side to prevent steam from escaping from the piston, owing to the defective condition thereof and to the want of packing in said piston; that, while the engine was standing still as aforesaid, it exploded, very seriously injuring him. It was alleged that the engine, at the time of the injury and for a long time prior, was in a dangerous and defective condition; that the engine had no crown bars, and that, if there ever had been any, they had been removed by defendant; that the flue sheet was cracked in several places; that many of the stay bolts in the crown-sheet were broken, and drawn out, and in a defective condition, and had been so for a long time prior to the accident, leaving the crown-sheet without a sufficient support to withstand the strain and heat thereon; that the crown-sheet had no safety plug, and that the engine was generally defective, and had not been put or kept in proper repair, all of which defects and defective condition were and had been known to defendant company for a long time prior to the accident; that the explosion and the injuries to the plaintiffs were caused solely by reason of the defective condition of said engine and boiler, and by reason of carelessness and negligence of the company in permitting the engine and boiler to become defective, and in carelessly and negligently using the engine and boiler in such defective condition with full knowledge and notice of the condition thereof, and in causing plaintiff to work thereon without giving him any warning. The plaintiff alleged that he had no knowledge or notice, before the injury, of the dangerous and defective condition of the engine. The answer denied every material allegation of the complaint pertaining to negligence or to the defective condition of the locomotive. The defendant pleaded that plaintiff and the engineer were fellow-servants, and that the accident was caused by the engineer's permitting the water in the boiler to become so low that the crown-sheet became hot and dry, and that the plaintiff and the engineer carelessly injected water into the boiler while the crown-sheet was so heated, and that this water was converted into steam, thereby causing the explosion. Defendant company denied that it had any knowledge of any defect in the engine, and alleged that, if it was defective, it was the duty of the plaintiff to report the defects, but that plaintiff never made any report of the defects in the said engine; that plaintiff was employed to work on the engine, and, if it was defective in the respects alleged, or in any respect, the said defects were apparent and known to the plaintiff, and that plaintiff

continued to work on said engine without complaint; and defendant averred that it was not aware and did not know of any defects in said engine. The replication denied the new matter in the answer. The plaintiff also denied that the defects were apparent and known to him, and further alleged that, during the short time he was employed upon said engine, there was no way by which he could have detected such defects and made complaint to the defendant and declined to work thereon. The cause was tried by a jury, and a verdict rendered for the defendant. Judgment was entered on the verdict for the defendant for costs. The plaintiff moved for a new trial, and the court sustained this motion. The defendant appeals to this court from the order of the District Court sustaining the motion for a new trial.

The first instruction assigned as erroneous substantially told the jury that, if plaintiffs directly contributed to their own injuries by their own negligence, they could not recover, even if the defendant was negligent. This is the general elementary doctrine of contributory negligence, laid down by text-writers and sustained by the decisions of this court. *Beach, Contrib. Neg. sec. 14; Hamilton v. Railway Co., 17 Mont. 334, 42 Pac. Rep. 860, and 43 Pac. Rep. 713.* We see nothing of record to take this case out of the general rule.

The next error assigned is that the court instructed the jury that defendant was not obliged to furnish the plaintiffs with the newest or latest improvements in construction upon the engine, but that all the law required was that defendant furnish plaintiffs with reasonably safe machinery and appliances, and that, if the jury believed from the evidence that the boiler of the locomotive was a good boiler of the kind, and in good repair, then plaintiffs assumed the risks incident to their employment, notwithstanding the jury's belief that a boiler of different construction would have been safer. This instruction must be considered with reference to several others, wherein the court expressly told the jury that the duty of the master is to use ordinary care to furnish suitable and safe machinery and appliances, and to keep the same in good repair, and to make all needed inspection and examination of the machinery and appliances, with a view of keeping the same in repair, and that a failure to do so would render him liable to the servant injured by reason of the omission of the master to properly perform these duties. The instructions on this point were in accord with our recent decision in *Johnson v. Mining Co., 16 Mont. 164, 40 Pac. Rep. 298.*

Error is also assigned because the court charged that the engineer and fireman were fellow-servants, and, if the fireman was injured by reason of the engineer's negligence, plaintiff could not recover.

This is the law generally, as laid down by the Supreme Court of the United States, cited and followed by this court in the following cases, by which we feel bound: *Goodwell v. Railway Co.*, 18 Mont. 293, 45 Pac. Rep. 210; *Hastings v. Railway Co.*, 18 Mont.; 46 Pac. Rep. 264.

The remaining error assigned by respondents is predicated upon the following instruction. "The jury are instructed that a servant, when he engages in a particular employment, is presumed to do so with a knowledge of its ordinary hazards, whether from the carelessness of fellow-servants in the same line of employment, or from latent defects in the machinery and appliances used in the business, or the ordinary dangers of the use of the same, and the law presumes that, when he enters into such employment he assumes all such risks; and if, in this case, you believe, from the evidence, that the accident in question was occasioned by any latent defect in the machinery, or that it was occasioned by the negligence of the plaintiff or his fellow-servant, then you are instructed that the plaintiff cannot recover in this case, and you should find for the defendant." The appellant's brief advises us that the last foregoing assignment of error was the only one pressed upon the consideration of the court below, when the motion for a new trial was argued. We further infer, from appellant's brief, that the particular objection urged was that the jury were misled by not having before them some explanation of the meaning of the words "latent defects" in the machinery. But, when the instructions are considered as a whole, the force of this objection is lost, because they were told elsewhere as follows: "I further instruct you that if you find, from the evidence in this case, that the boiler in question in this case exploded without any fault on the part of the plaintiffs, or either of them, and that such explosion was caused by defects in the boiler, as alleged in plaintiffs' complaint, which the agents of the defendant, charged with the duty of keeping it in repair, knew of, or by the use of ordinary care ought to have known of, and that plaintiffs were injured by such explosion, then I instruct you that each of the plaintiffs will be entitled to recover of the defendant such damages as will compensate him for such injury, not exceeding the amount claimed in his complaint." Examining these two instructions, we find that by one the jury were told that, if the explosion was not caused by any fault on the part of plaintiffs, but was caused by reason of any of the defects named in the complaint, and which the defendant knew of, or by exercise of ordinary care and prudence ought to have known of, the plaintiffs could recover, while by the other they were told that the defendant was not liable for accidents arising by

reason of latent defects in the machinery and appliances used. We take it to be the law that, if the master can only be held to the use of ordinary care and prudence in furnishing safe machinery to the servant, and keeping the same in proper repair, but that he cannot be held as a warrantor of the safety of the machinery, it reasonably follows that the master is not liable to the servant for latent defects in the machinery or tools furnished which ordinary inspection and exercise of ordinary care would not or has not detected. Now, when this doctrine is applied to the two instructions quoted above, we find the one practically explanatory of the term "latent" used in the other, and that the doctrine and significance of patent and latent defects and dangers, incidental to the plaintiff's employment, was sufficiently laid before the jury. The respondents did not ask the court to instruct the jury more fully, or at all, so far as the record advises us, upon "latent defects," and they cannot now complain because the instructions that were given did not more fully state the law.

Order granting a new trial reversed.

Opinion by HUNT, J.

KNAPP V. JONES ET AL.

Supreme Court, Nebraska, February, 1897.

INJURED BY ELEVATOR — CONTRIBUTORY NEGLIGENCE.—Where plaintiff was struck and injured by an elevator as it was in operation, and it was shown that his failure to exercise ordinary care caused the injury, he cannot recover.

DIRECTING VERDICT.—It is not error to direct verdict for defendant where the facts leave no doubt as to the contributory negligence of plaintiff.

FROM a judgment for defendants in the District Court, Douglas County, plaintiff brings error.

CONNELL & IVES, for plaintiff in error.

BRECKENRIDGE & BRECKENRIDGE, for defendants in error.

The plaintiff, by his next friend, instituted this action in the District Court of Douglas county to recover of the defendants damages which he alleged were caused by injuries to him as the result of negligence on the part of defendants. The amount claimed was \$15,000. It was stated in the petition that the defendants were the owners and managers of a five-story building in the city of Omaha, the rooms of which, above the ground floor, were occupied and in use as offices by various tenants; that there was a passenger elevator

maintained and operated by defendants between the ground floor and upper stories of the building, for the use of tenants and persons having business to transact therein. The negligence was denied by defendants, and they averred that plaintiff was injured by his own negligence. At the request of defendants the trial judge directed a verdict for defendants for which plaintiff brings error. The plaintiff was at the time he was injured between sixteen and seventeen years of age, and was, it was stated by one of the doctors who was testifying in respect to plaintiff's condition and appearance before the injury, "a remarkably bright, clean, healthy, active, energetic, genial, pleasant young fellow. * * *" But this is immaterial. No question has been raised as to youthfulness and consequent lack of discretion on the part of plaintiff. A few minutes before the noon of January 13, 1893, the plaintiff was in the office of the physician, his employer, on the third floor of defendants' building. The doctor was out of the office and building, and the plaintiff was evidently expectant of his return. However this may have been, the plaintiff left the office rooms through a door which was, relatively to the elevator, immediately across the hallway, stepped over to the elevator shaft, passed the wire screen, which, as we have before seen, had been removed from its place, and was then upon the floor near the stairway, went up to the second step of the stairs, and reaching or leaning over the thirty-six-inch high board partition or barrier, put his head and the upper portion of his body into the elevator shaft,—as he states it, to look at the elevator, which was below, to see and ascertain whether the doctor was therein and coming to the office. The elevator was coming up, and the weights down. The plaintiff was struck or caught by the weights in their descent, and the injuries to him, the basis of this action, resulted. It is urged that the question of whether or not there was contributory negligence on the part of plaintiff should have been submitted to the jury. The undisputed facts were such, we think, that different minds might not reach different conclusions or draw different inferences from them in regard to the plaintiff's want of ordinary care and prudence; and the court did not err in not submitting the question to the jury, and, on motion of counsel for defendants, charging that body to return a verdict favorable to defendant (1).

Judgment affirmed.

Opinion by HARRISON, J.

1. Citing and approving *Slayton v. Railroad Co.*, 40 Neb. 840, 59 N. W. Rep. 510, also *Thomp. Trials*, § 2267. See also *Dewey v. Railroad Co.*, 31 Iowa, 373; *Davis v. Hilbourn*, 41 Neb. 35, 59 N. W. Rep. 379; *Bank v. Rice*, 44 Neb. 594, 63 N. W. Rep. 60.

UNION PACIFIC RAILWAY COMPANY v. DOYLE.

Supreme Court, Nebraska, February, 1897.

EMPLOYEE INJURED ON GRAVEL TRAIN — FELLOW SERVANT.—The defendant in error was a section hand in the employ of the railroad company. He and others were hired by one Cochran, a section boss, in the employ of the railway company, and they were under his control and direction while working on their section of the railway, and Cochran had authority to discharge the men hired by him. Cochran and his section men were put to work on a gravel train of the railway company. This gravel train, the crew thereof, and all the men working thereon, including Cochran and his section men, while at work with the gravel train, were under the control, direction, and subject to the orders of a foreman named Forrest. Forrest was not invested with authority to hire or discharge the defendant in error. The defendant in error, while working on this gravel train, was injured, as he alleged, through the negligence of an order given by Forrest, and sued the railway company for damages. *Held* that, as to the defendant in error, Forrest was not a fellow-servant, but a vice-principal.

VICE-PRINCIPAL.—Whether one of several employees of the same master is a vice-principal as to his co-employees, or whether all are fellow-servants, is not always a question of fact, nor always a question of law. Generally it is a mixed question of law and fact, and to be determined in any case by the particular facts and circumstances in evidence in the case in which it is presented.

FELLOW-SERVANT — VICE-PRINCIPAL — EVIDENCE.—The fact that one employee is vested with authority to hire and discharge a co-employee is not conclusive evidence that, as to such co-employee, he is a vice-principal; nor does it follow that one employee is not a vice-principal as to his co-employees because not vested with the authority to hire and discharge them.

VICE-PRINCIPAL — EVIDENCE.—The most satisfactory evidence that one is, as to his co-employees, a vice-principal, is that his co-employees are under his supervision, his control, and subject to his orders and directions.

PROXIMATE CAUSE.—Evidence examined, and *held*: 1. To sustain the finding of the jury that the negligence of the defendant in error was not the proximate cause of his injury; 2. Not to sustain the findings of the jury that the negligence of the railway company was the proximate cause of the defendant in error's injury.

(Syllabus by the court.)

ERROR to District Court, Deuel County. From judgment for plaintiff, defendant brings error.

J. M. THURSTON, W. R. KELLY and E. P. SMITH, for plaintiff in error.

JOHN R. BROTHERTON and McCLANAHAN & HALLIGAN, for defendant in error.

The facts of the case in addition to those stated in the syllabus by the court, are substantially as follows: At the time the accident sued for herein occurred, and before that time, Doyle was a section hand in the employ of the railway company. He and a number of other men were employed by one Cochran, who was what is called a section foreman, or boss, in the employ of the railway company. All these men were hired by Cochran, the section boss, were subject to discharge by him, and were under his direction and control while engaged in working upon their section of the railway. At this time the railway company had a gravel or work train on its road, hauling earth and gravel and placing them on the track. Cochran and his gang of men were put at work on this train; and the train crew and some other laborers of the railway company on the train, and Cochran and all his men, while working on the gravel train, were under the control, direction, and supervision of a foreman named Forrest; but the latter had no authority to hire Doyle, nor to discharge him (1).

1. As to the question of fellow-servant and vice-principal the court cited several cases, among them, *Railway Co. v. Erickson*, 41 Neb. 1; *Railway Co. v. Lundstrom*, 16 Neb. 254; *Railroad Co. v. Crockett*, 19 Neb. 138; *Railroad Co. v. Smith*, 22 Neb. 775; *Railroad Co. v. Sullivan*, 27 Neb. 673; *Railway Co. v. Ross*, 112 U. S. 377.

The case of *Palmer v. Railroad Co.* (Mich.) 53 N. W. Rep. was cited as being strikingly like the case at bar, and the ruling therein was to the same effect in *Bloyd v. Railway Co.* 58 Ark. 66.

Railroad Co. v. Baugh, 149 U. S. 368, was distinguished from *Railway Co. v. Ross*, 112 U. S. 377, and the case of *Railroad Co. v. Peterson*, 57 Fed. Rep. 182, 2 C. C. A. 157, 16 Sup. Ct. 843, was said to not only overrule the *Ross* case, but to practically destroy the doctrine of vice-principal in railroad cases. In commenting on the *Peterson* case the court said:

"The logical effect of this decision is that all section men, track repairers, section bosses, bridge repairers and their bosses, construction trains, work trains, and their conductors and fore-

men are fellow-servants; and the road-master, and he only, as to them, is a vice-principal, because he is the "chief in charge of that branch or department of the railroad company's business," namely, the care and repair of the track. We do not assume to criticise this opinion, but we are at liberty to point out the result which must flow from it if it shall stand. The opinion attempts a classification for the operation of a railroad that no general manager would countenance for a moment. The managers of railroad corporations have not made the track men and the section men, the foremen of gravel and construction trains, and the crews thereof, fellow-servants. They have divided their roads into sections, and on each section they have a number of men to repair and care for the track, and over these men they have placed a superintendent, a boss or foreman, with authority to hire and to discharge these men, with supervision and control over them. This boss is not required to labor, and is paid a higher wage than a common laborer; and to the road-master, and to him alone, is this boss responsible. They have placed upon their roads

The evidence shows that this gravel train consisted of an engine and tender, next to which was a tool car. These were equipped with an air brake. Following the tool car were twelve flat cars and an ordinary caboose, connected together by means of links and pins, the space or slack between any two cars being about two feet. The train was standing upon the track. Forrest, the foreman in charge, was standing on the ground north of the train, and north of a ditch on the north side of the track. The men had finished shoveling the dirt from the car next to the caboose to the ground. Forrest then said to Doyle: "Come down and shovel this earth between the rails." Doyle prepared to obey the order by stepping from the flat car to the platform of the caboose. At that moment Doyle heard Forrest call to the engineer to pull up a car length. The bell rang, the whistle sounded, and the train moved; Doyle standing on the platform, either intending to alight from the car while in motion, or to alight after it stopped. The train moved at a rate of speed not to exceed a mile and a half an hour. Without warning to Doyle, Forrest gave a signal to the engineer for an instantaneous stop of the engine. The order was obeyed. The engine stopped instantaneously. The caboose on which Doyle was standing struck against the car in front of it, and Doyle was thrown against the brake, and injured. The jury, by its verdict, has said that Doyle was not guilty of contributory negligence in standing upon the platform of the caboose as he did while the train was moving, and we think the evidence sustains that finding. It may have been evidence of negligence for Doyle to stand there. When the engine stopped, Doyle may have heard the clashing together of the cars in time to have

certain construction and gravel or dirt trains. On these trains there is a conductor, an engineer, a fireman, a brakeman, and with these trains go a number of laborers, each gang under immediate charge of one or more bosses; and all these men, including the train crew, the bosses, and the common laborers, are placed in charge of a foreman, who superintends, manages, controls, and directs when, how, and where the work shall be done, and this foreman is not made, by the rules of the railroad company, a fellow-servant with the men under his direction, but he is responsible for his conduct to the road master. We repeat that we have not examined these

opinions of the Supreme Court of the United States for the purpose of criticism. For our part we are satisfied to follow the Ross case. The decisions of our own court [in the cases above cited] are all based upon the principles which control the Ross case, and, whether it be considered as distinguished or overruled by the tribunal which rendered it, we still think it is law, and we are not prepared to adopt the doctrine that an employee, to become a vice-principal as to his co-employee, must be the chief of a separate and distinct department or branch of the business of his employer."

braced himself to prevent a fall. He may have taken such precaution to brace himself as he thought necessary to his protection. Under the circumstances, we do not think his not going into the caboose and taking a seat was conclusive evidence of negligence on his part. But whether Doyle's conduct, under the circumstances, was negligence upon his part was for the jury, and we cannot say that they reached a wrong conclusion in finding that he was in the exercise of ordinary care.

But is there any evidence here to show that Doyle's injury resulted from the negligence of this railway company, or any one connected with it? Doyle knew that the train was in motion. He knew that it was being moved up about a car's length, so that he and others might get off and shovel the earth between the rails, and he was charged with notice that, when the car on which he stood had moved up about a car's length, it would stop. The evidence that Forrest called out to the engineer to pull up a car's length does not justify a conclusion of negligence. The fact that the train moved at a mile and a half an hour does not justify a conclusion of negligence. The fact that the train stopped instantaneously does not justify a conclusion of negligence. Had Doyle and his co-laborers been at work shoveling earth from this train, and Forrest had given a signal to start it, without any warning thereof, that would have been evidence of negligence. Had the train been in motion, and these men shoveling the earth from the train, and Forrest had given a signal to stop the train, without any warning, that would have been evidence of negligence. But these are not the facts in this case. The work had been done. The order had been openly and notoriously given, and heard by Doyle, for the train to pull up about a car's length. The whistle had been sounded and the bell rung, and Doyle knew not only that the train was moving, but he knew that it was to move about a car's length, and, when it had gone about that distance, he knew that it was to stop. The negligence charged to the railway company here is not the starting of this train, not the speed at which it was moving, but its being stopped instantaneously, without warning to Doyle. He knew when he first reached the platform of the car, and while he was standing there he knew, that the train was being pulled up to a particular place, and was likely to stop the moment it reached it. It is not for us to say whether Doyle was guilty of contributory negligence in standing on the platform as he did while the train was in motion. It is not for us to say that he was guilty of negligence in not watching, and bracing himself, and preparing for the stopping of the train. All that was for the jury, and they have said that he was not guilty of contributory negligence,

under the circumstances, and we have no disposition to interfere with that. But the fact remains that, if he was injured, such injury was not the result of any negligent act or omission of this railway company or any of its servants. Doyle's theory is that the train was moving very rapidly, and that it was stopped instantaneously, without notice to him, which threw him against the brake, and hurt him. With all due respect to the jury, one of two things is not true. Either that train was not moving rapidly, or it was not stopped instantaneously. A heavy locomotive engine, if moving rapidly, cannot be stopped instantaneously, by an air brake or any other appliance known. If it was not stopped instantaneously, then there was no violent jamming of the caboose against the car in front of it; and to sanction the verdict of the jury finding both ways on that proposition is to judicially determine that the laws of nature, which control the universe, have no application in Nebraska. The judgment of the District Court is reversed.

Opinion by RAGAN, C.

FREMONT, ELKHORN AND MISSOURI VALLEY RAILROAD COMPANY v. HARLIN.

Supreme Court, Nebraska, February, 1897.

OVERFLOW—SURFACE WATER—PLEADING.—A plaintiff alleged in his petition that the defendant, a railroad company, carelessly and negligently constructed its ditches along its track through the lands of plaintiff in such a manner as to cause the surface waters to collect in said ditches and be precipitated on plaintiff's land, whereby certain of his crops were destroyed, certain of his trees growing on said land were destroyed, and his land was depreciated in value by the deposit thereon of clay and sand. *Held*: 1, that, because of the general allegation of the railroad company's negligence in constructing its ditches, the petition was open to a motion to make more definite and certain; 2, but that the general allegation of negligence was good as against a demurrer, and therefore the petition stated a cause of action.

RELEASE—RIGHT OF ACTION.—A landowner conveyed to a railroad company a right of way across his land. The conveyance contained the following release: "For the consideration aforesaid, do hereby release and discharge the said party of the second part, its successors and assigns, from all costs and damages which the said party of the first part has now sustained, or shall at any time hereafter sustain, in any way by reason of the construction, building or use of the said railroad." The railroad company afterwards built its road on the right of way purchased, and in so doing constructed thereon certain ditches for the purpose of draining its road-bed.

Subsequently the landowner conveyed his land to the defendant in error, and he sued the railroad company for damages, alleging that said ditches were negligently constructed, and by reason thereof they conducted the surface waters collected therein on his land, destroyed certain of his crops and certain of his trees, and injured his land by depositing sand and clay thereon. The railroad company pleaded the release in the right of way deed in bar of the action. *Held*: 1, that if the release would estop the original owner, had he retained the land and brought this action, it would likewise estop the defendant in error; 2, that the true construction of the release is, that by it the landowner acknowledged satisfaction for the value of all the land appropriated by the railroad company for its right of way, and released and discharged it from all damages which the remainder of his land had sustained, or would sustain, by reason of the negligent construction, maintenance and operation of its road across the lands for all time; 3, that the release should be given the same effect as if it were a judgment rendered in a condemnation proceeding instituted by the railroad company for right of way over the land; 4, that in such a judgment, and therefore in the release, were not included damages for injuries that might afterwards arise as the result of a negligent construction, maintenance or operation of the road; 5, that it was not within the contemplation of the parties to the right of way deed, at the time it was executed, that the railroad company would negligently construct, maintain or operate its road; 6, that had the right of way been obtained by condemnation, the landowner in that proceeding could not have been awarded damages upon the theory that he might in the future sustain injury by reason of the railroad company's negligently constructing, maintaining or operating its road; 7, that the defendant in error's cause of action arose when the injury sued for occurred, and not when the ditches were completed; 8, whether the ditches were properly and skilfully constructed for railroad purposes was not the material issue in the case; 9, and, if so constructed, that, of itself, did not afford the railroad company a complete defense to the action, as the material issue in the case was whether the railroad company had so constructed its ditches as to unnecessarily and negligently injure the defendant in error; 10, that the measure of the defendant in error's damages was the value of his crops destroyed, the value of his trees destroyed and the difference in value of his land immediately before and after the depositing of the sand and clay thereon.

ACT OF GOD—PLEADING.—In addition to the general denial that the defendant in error had sustained any damages, and that it had been guilty of any negligence in constructing its ditches, the railroad company interposed the defense that the damages claimed resulted from a rain storm so unprecedented as to amount to the act of God. The District Court instructed the jury that if the railroad company had failed to establish, by a preponderance of evidence, the defense interposed, they should find for the defendant in error. *Held*: that the giving of the instruction was reversible error.

IRVINE, C., dissenting as to measure of damages.
(Syllabus by the court.)

ERROR to District Court, Saunders County. Judgment for plaintiff, and defendant brings error.

JOHN B. HAWLEY, WM. B. STERLING and J. E. FRICK, for plaintiff in error.

C. HOLLENBECK, for defendant in error.

The questions raised on the writ of error are sufficiently stated in the syllabus by the court.

Judgment reversed.

Opinion by RAGAN, C.

FREMONT, ELKHORN AND MISSOURI VALLEY RAILROAD COMPANY v. WATERS.

Supreme Court, Nebraska, February, 1897.

CARRIER OF GOODS—CONNECTING LINES.—It is the duty of a railroad company in Nebraska, subject to such reasonable rules as may be adopted in the transaction of its business, as a common carrier, to receive and transport goods offered for shipment, to the terminus of its line, and in case such goods are consigned to a point beyond its line, to safely deliver them to a connecting carrier.

CONNECTING LINES—LIABILITY.—A railroad company, receiving for shipment, goods consigned to a point on the line of a connecting carrier, under an agreement to transport them to the terminus of its own road, is neither at common law nor by statute of Nebraska answerable therefor, after their safe delivery to the connecting line named in the bill of lading or contract of shipment.

INSTRUCTION—WHEN GROUND FOR REVERSAL.—An instruction, unwarranted by the evidence, although an accurate statement of the law, is ground for reversal, provided it has a tendency to mislead the jury.
(Syllabus by the court.)

ERROR to the District Court, Seward County. From a judgment for plaintiff, defendant brings error.

WM. B. STERLING, B. T. WHITE and D. C. MCKILLIP, for plaintiff in error.

NORVAL BROS. and GEO. W. LOWLEY, for defendant in error.

The cause of action alleged in the petition below is: 1, That the defendant company neglected and refused, upon the plaintiff's demand, to furnish him, the said plaintiff, cars for the transportation of corn from Goehner station, in this State, to Chicago, between November 12 and 28, 1891, although notified in advance that he would require twelve cars for the shipment of his grain, amounting to 5,000 bushels and over, then on hand, which was, as the defendant well knew, worth in the Chicago market, if delivered during the month of November, eighty cents per bushel, but which was, when

subsequently delivered, worth forty-five cents or less per bushel. 2, That on and after November 28, 1891, plaintiff delivered to the defendant company, in good condition, eight carloads of shelled corn, which the latter undertook to transport from the station above named to Chicago, but that, through the negligence of the defendant, sixty bushels of said corn, of the value of eighty cents per bushel, were lost, and 5,014 bushels thereof were, on account of the bad condition of the cars furnished by the defendant, damaged in transit to the amount of twenty cents per bushel. The answer admits the receipt by the defendant company of eight cars of corn, which it undertook to transport from Goehner station to its terminal point, at Missouri Valley, in the State of Iowa, where said corn was, by agreement with the plaintiff, delivered, in as good condition as when received, to the Chicago & Northwestern Railroad Company, a connecting carrier, and was by the last-named company, in like condition, delivered to the plaintiff's consignee in the city of Chicago. It is in the answer further alleged that there was during the period mentioned in the petition an unusual and extraordinary demand for cars to be used in the shipment of corn to the Chicago market, and that the defendant company made a just and equitable distribution of cars among its patrons, including the plaintiff. Accompanying the foregoing statements of the answer is a denial, which puts in issue the other allegations of the petition. The reply is a general denial.

There is in the bill of exceptions no evidence tending to prove that the defendant undertook to transport the corn beyond the terminus of its own line or an agreement between the said defendant and the Chicago & Northwestern Company with respect to through traffic over their respective lines, while by the contract of shipment as evidenced by the several bills of lading it was expressly stipulated that the liability of the defendant company should cease upon the delivery at its depot at Missouri Valley of the property which is the subject of this controversy, in as good condition as when received, to the Chicago & Northwestern Company as a connecting carrier, and an instruction which assumes certain facts of which there is no proof, is erroneous.

As to the common-law liability of the initial carrier upon a through bill of lading on account of loss or damage to goods by a connecting line to which they have been delivered for transportation, the authorities are not harmonious. The question of the carrier's liability in such case has in this State been made the subject of both constitutional and statutory regulation. Section 4, art. II, Const. 1875, provides that "the liability of railroad corporations as common

carriers shall never be limited." Section III, c. 16, Comp. St., entitled "Corporations," declares that "any railroad company receiving freight for transportation shall be entitled to the same rights and be subject to the same liabilities as common carriers;" and by section 5, art. I, c. 72, Comp. St., entitled "Railroads," it is provided that "no notice, either express or implied, shall be held to limit the liabilities of any railroad company as common carriers, unless it shall make it appear that such limitation was actually brought to the knowledge of the opposite party and assented to by him or them in express terms before such limitation shall take effect." These restrictions were examined in *Railroad Co. v. Palmer*, 38 Neb. 463, 56 N. W. 957, and held applicable to contracts made in this State for the transportation of goods beyond the carrier's own line. *Irvine, C.*, in the case cited, after a review of the earlier decisions of this court, says: "The contract of the shipper was with the carrier first receiving the goods; and, if such carrier undertook to deliver the goods at their destination, even though it contemplated doing so through intermediate carriers, it assumed a liability of such character for every part of the route." But the rule thus stated can have no application to the facts of the case at bar, since the limitation here involved relates to the obligation of the defendant company to accept the corn in question for transportation beyond the terminus of its own road, and not to its liability as a carrier under the contract as actually made. It was the duty of the defendant company, subject to such reasonable rules as may have been adopted in the transaction of its business as a common carrier, to receive the plaintiff's corn, and transport the same from the point of shipment to the terminus of its line at Missouri Valley, and there safely deliver it to a connecting carrier. But upon the delivery of goods in such case to the connecting carrier designated in the bill of lading or contract of shipment, the common-law liability of the initial carrier ceases, and any duty on its part respecting the transportation of such goods over connecting lines results from contract obligations. It was accordingly competent for the defendant company to contract for the transportation of plaintiff's corn from Goehner station to Missouri Valley, and to stipulate that its responsibility therefor should cease upon the delivery of said corn to the Chicago & Northwestern Company.

The instruction as to the facts being misleading is reversible error.
Judgment reversed.

Opinion by Post, CH. J.

CHICAGO, BURLINGTON AND QUINCY RAIL-ROAD COMPANY v. SODERBURG.

Supreme Court, Nebraska, February 1897.

RISKS OF EMPLOYMENT.—A servant, by his contract of employment, assumes the ordinary risks and dangers incident thereto.

NEGLIGENCE—WHAT MUST BE PROVED.—To sustain a verdict of negligence, it must have the support of competent positive evidence, that the injury complained of was caused by the negligence of the defendant, or such negligence must be fairly and reasonably inferable from proved or conceded facts.

EMPLOYEE INJURED ON TRACK.—Where a section hand was injured on the track, the evidence held not sufficient to sustain a finding of negligence. (Syllabus by the court.)

ERROR to District Court, Kearney County. From judgment for plaintiff, the defendant brings error.

T. M. MARQUETT, J. W. DEWEESE, J. L. MCPHEELY and W. S. MORLAN, for plaintiff in error.

ED. L. ADAMS, for defendant in error.

Plaintiff in error seeks a reversal of a judgment in the sum of \$5,000 which was rendered by the District Court of Kearney county upon the verdict of a jury. Defendant in error alleged, in substance, that on May 22, 1893, he was a section hand in the employ of the railroad company; that in the afternoon of that day, while the wind was blowing very hard, and rain falling, he, under the direction of a foreman, was working on the railroad at a point about fifty-seven rods east of a highway, and that about twenty-three rods east of where he was at work there was a post, at which post the employees in charge of trains of the railroad company were required to ring a bell and sound a whistle until the aforesaid highway should be reached; that the point where he was working was near the foot of a grade descending from the east; that trains coming down said grade usually made but little noise, other than by the escape of steam, which on said morning could not be heard. The negligence charged was the failure to sound the whistle and ring the bell as it was above indicated should have been done, and the failure of the foreman of the section gang to give notice of the approaching train before it struck the plaintiff. The following facts appear, without contradiction, from the evidence adduced: The section gang in the forenoon on May 22, 1893, was required, by the unfinished condition of the work, to surface up a portion of the track at a point about

three and one-half miles east of Minden, the station nearest where the work was to be done. The day began with considerable wind, which grew stronger, and at about nine o'clock, when the accident happened, was blowing very hard. There were occasional showers of rain, accompanied with sleet. The whistling post was at the west end of a cut, and west of this post was a bridge, 540 feet distant. This post, as stated in the petition, was eighty rods east of a highway crossing. The foreman distributed his men along a high grade approaching this bridge; Soderburg being placed about ninety feet east of the bridge, and directed to throw earth from the south side of the embankment upon the ties, and there so to dispose of it that the water would run each way from the center of the track. Two men were between twenty and thirty feet east of Soderburg and another was ninety feet east of him, on the north side of the track. The foreman, after he had disposed of his men as above indicated, noticed that one side of the bridge seemed a little low; and thereupon he went under it, to see if there was anything wrong. When he had finished his inspection, the foreman came upon the track at the east end of the bridge, and looking eastward he saw, at a distance of about a quarter of a mile, a freight train approaching, and immediately called to his men, notifying them of that fact. At this time Soderburg was on the embankment, outside the south of the ties, and was stooping over, throwing earth upon the ties between the rails. One of the hands testified on behalf of plaintiff that, though fifteen feet away, he could not, by calling to him three or four times, make plaintiff aware of the approach of the train. Another, though he was within fifteen or twenty feet of his brother, was not able to understand what he was calling out. He saw that he was calling out something, and, looking in the direction he was pointing, discovered the approaching train. He further testified that it was a dreadful windy and stormy day. Plaintiff's testimony threw no light on the subject. The above was all the evidence given as to the surroundings and employment of Soderburg when struck by the train. There was evidence that tended to show that the foreman had said to his men that in the yards, and while moving over the track in a hand car, he would look out for trains, and that the men need not trouble themselves to be also looking. There was no evidence that, when his section men were surfacing the track, the foreman, by reason of any promise, rule or custom, was required to warn them of the approach of trains. They had the same means of knowing of this fact that he did. Plaintiff was bound to know that trains were likely to be moving along this track; and there is undisputed evidence that, if he had looked eastward, he could have seen

this train almost a half mile distant. It was held by this court, in *Dehning v. Iron Works*, 46 Neb. 556, 65 N. W. Rep. 186, that it will be presumed that an employee contracts with reference to the risks ordinarily appertaining to his particular employment, and that he has notice of all the risks which are open and obvious, or ought to have been, to a person of his experience and understanding. In *Railroad Co. v. Baxter*, 42 Neb. 793, 60 N. W. Rep. 1044, this rule was stated in this language: "A servant, by his contract of employment, assumes the ordinary risks and dangers incident thereto." These views are in accord with those expressed in *Ring v. Railroad Co. (Mo.)* 20 S. W. Rep. 436, and *Nelling v. Railroad Co. (Iowa)* 63 N. W. Rep. 568.

It is, however, insisted that it was shown that there was negligence in failing to ring the bell and sound the whistle for the crossing from the time the engine passed by the whistling post until it reached such highway crossing. The engineer testified in the most positive terms that the bell was arranged to ring automatically, and that, on account of the high wind and the storm, it was kept ringing from the time the engine left Hastings until it reached Minden. He also testified that he sounded the whistle from the time he left the whistling post until he reached the highway crossing. The fireman testified that he was so accustomed to the sound of the bell and whistle that he did not notice either. The foreman's testimony was that, if there had been no wind or storm, he could have heard the whistle and bell, but, with both wind and storm prevailing as it did, he did not know whether he could have heard them or not. As it was, he did not hear the bell or whistle. The effect of the testimony of the other witnesses was that they did not hear the bell or whistle, but whether they could have heard the sound, if either had been used, notwithstanding the wind and the storm, they did not undertake, nor were they required to state. The burden of showing negligence rested upon the plaintiff. *Spears v. Railroad Co.*, 43 Neb. 720, 62 N. W. Rep. 68. There was not sufficient evidence to justify a finding that any employee of the railroad company was guilty of negligence.

Judgment reversed.

Opinion by RYAN, C.

DELAWARE, LACKAWANNA AND WESTERN RAILROAD COMPANY v. BULLOCK.

Supreme Court, New Jersey, February 1897.

CARRIER OF PASSENGERS—RULE AS TO PACKAGES.—A person entitled by the terms of his ticket to "personal passage" on a railroad car has not the right to carry with him packages of groceries for the use of his family.

DUTY OF CARRIER.—The officers of the railroad company, after he enters the car cannot lawfully take such packages from him by force.

REMEDY—EJECTING PASSENGER AND PACKAGE.—The remedy of the company, after giving him notice to remove such packages from the car, and his refusal to do so, is to remove the passenger and his packages using no unnecessary force.

(Syllabus by the court.)

ACTION by Thomas O. Bullock against the Delaware, Lackawanna and Western Railroad Company. Verdict for plaintiff. Rule to show cause why new trial should not be granted. The facts appear in the opinion.

JOHN LINN, for plaintiff.

MCGEE, BEDLE & BEDLE, for defendant.

VAN SYCKEL, J.—On the 28th of January, 1896, Bullock, the plaintiff, went to the Hoboken station of the defendant railroad company, intending to take passage on its cars to Dover. He had with him two tickets, entitling him to a passage,—one a family ticket, and the other a commutation ticket. On the family ticket there was a contract indorsed, "that in consideration of the reduced rate at which the ticket was issued, wearing apparel only should be taken as baggage." On the commutation ticket the contract was "that it entitled the holder to personal passage only." On the day named the plaintiff entered the car, carrying with him two packages containing an assortment of groceries purchased for the use of his family. He was informed by employees of the company that he had no right to take the packages with him, and that he must remove them, or get off the car himself. He declined to do either, and thereupon the packages were taken from him, and put in the express car, and he was allowed to proceed on his journey. This suit was brought to recover damages for this alleged injury, and the trial resulted in a verdict for the plaintiff for \$1,006.

The rights of the passenger must be measured by the contract he made with the company. Whether the conditions annexed to it

are reasonable is a matter of no legal importance whatever. The parties were competent to contract, and made the contract for themselves; and it could not be altered or abrogated by one of the parties to it without the consent of the other. The right to personal passage clearly does not include the right to transportation of packages of groceries, and such packages are not a part of the wearing apparel. The rights of the respective parties must be adjudged upon the assumption that the railroad company was under no legal obligation to carry the passenger and the packages. The plaintiff had a qualified right—that is, a right to personal passage,—and when he presented himself at the door of the car with the forbidden packages he was disqualified to demand a passage under the terms of his contract. The agreement of the company was to transport him, and not to carry him and a lot of groceries. When he presented himself at the door of the car, he was not within the description of the contract for transportation, and the company had a right to refuse him admittance until he removed the disqualification, and applied in conformity to the terms of their undertaking. At that juncture it seems to be very clear that the company could do no more than deny admission to the plaintiff, and resist his entrance into the car by such reasonable force as was necessary to prevent it. The plaintiff had voluntarily rendered himself disentitled to exact performance of the agreement on the part of the company, but that would not have justified the company in resorting to force to separate the packages from his person, and thereby remove the voluntary disqualification. The packages were the property of the plaintiff. He had a right to the possession of them, and no one could lawfully wrest them from him against his will. But he succeeded in entering the car with his packages, although he was warned that he had no right to do so. What could the company lawfully do under the circumstances? Anything which the company might do, to be lawful, must be an act which would cast no after-duty on it to the passenger in respect to such act, nor subject the company to any after-liability for damages by reason of having done it. Such after-responsibility would incontestably prove that the company had overstepped the line which circumscribed its right to redress itself. Applying this test, can the act of the company, which constitutes the alleged wrong in this case, be justified? If the company took the plaintiff's property from him against his will, and removed it from the car, it became the voluntary custodian of such property; and it is not perceived how the company could escape legal liability to restore it to the plaintiff, or answer for its value in damages. The officer of the company not only took the

packages without the consent of the plaintiff, but he took them by force, while the plaintiff resisted, and tried to prevent it. He had no more right to resort to force to remove such property than the manager of a theatre would have forcibly to take the hat from the head of a lady who had a seat there under a contract that she would not wear a hat during a play. The remedy would be to remove the person who refuses to conform to the conditions under which the benefit of the contract can be claimed. The presence of the plaintiff in the car did not deprive him of the right to the possession of his property. His presence there with such property was offensive to the contract. It put him in the position of any other person who had no right to remain upon the train, and subjected him to be ejected with his packages, no unnecessary force being used. It was for the plaintiff to elect, upon being notified that he must remove his goods or leave the train, whether he would accept transportation upon the terms agreed upon. The right of the company was to refuse to carry him under existing conditions, and it was without legal authority to resort to force to put him, against his will, in such condition that he would be entitled to his seat in the car. Force could be legally exerted only upon the disqualified man. The forcible removal of his parcels, and the transfer of them to the express car with orders to carry them onward was unlawful, and constituted a conversion. The trial court submitted the case to the jury with proper instructions upon this question, but, in my judgment, the damages given by the jury are excessive and unwarranted under the circumstances disclosed by the evidence. The plaintiff himself provoked the difficulty by attempting to assert a right which he did not possess. The contract was plain and unambiguous, and he chose to resort to the forcible method of asserting an unfounded claim, and deliberately invited a conflict with the servants of the company at a time when they were compelled to act quickly. In an action for damages resulting from a mistake committed under such circumstances the plaintiff should be strictly limited to compensation for his loss. There was manifestly no malice on the part of the company, and no ground for punitive damages. The plaintiff's loss will be satisfied by paying him the value of his parcels and for the injury done to his clothing, which was slight.

The rule to show cause should be made absolute.

LOWER v. SEGAL.

Supreme Court, New Jersey, February, 1897.

DEATH—NEGLIGENCE—PLEADING.—Declaration based upon a statute of Pennsylvania, sought to recover damages for the death of plaintiff's intestate in that State, occasioned by defendant's negligence. Upon demurrer it was *held* bad, because it disclosed that plaintiff was the widow of deceased, and that by the law of Pennsylvania the action could not be maintained by a personal representative under such circumstances.

Application being made by plaintiff to amend the proceedings so that the action may appear to have been brought by her as widow, *Held:*

1. That the propriety of making the amendment asked must be determined without reference to the fact that plaintiff is both widow and personal representative of the deceased; and the amendments should only be made if, in case this action had been brought by another person as such personal representative, the widow should be permitted to substitute herself as plaintiff, and amend the proceedings so as to present her claim against defendant.

2. Such an amendment would not tend towards the determination in this suit of the real question in controversy between the parties thereto, but would operate to institute a new suit between different parties, and presenting other questions. It is not an amendment that the court is required to make.

3. The amendment asked would be unreasonably vexatious to defendant, for it appears on the face of the declaration that the action was not brought within the period limited by the laws of Pennsylvania for bringing such actions.

(Syllabus by the court.)

ACTION by Lillie B. Lower, administratrix, against Adolph Segal.
On application to amend summons and declaration.

HOWARD CARROW, for plaintiff.

R. WAYNE PARKER, for defendant.

The questions presented sufficiently appear in the syllabus by the court. Application denied.

Opinion by MAGIE, J.

HURLEY v. NEW YORK & BROOKLYN BREWING COMPANY AND BROOKLYN HEIGHTS RAILROAD COMPANY.

*Supreme Court, Appellate Division, Second Department, New York,
January, 1897.*

COLLISION — PROXIMATE CAUSE OF DEATH.—Where it appeared that a heavy beer wagon was driven out of a yard into a street upon which there was a horse railway, without first ascertaining whether the way was clear, and the pole of the wagon pierced the side of a car that was passing and injured a passenger, who died ten months afterwards from consumption that was the effect of the injury, a verdict for the plaintiff was sustained.

BRAKES — FAILURE TO FURNISH.—Whether the failure to furnish a brake for the truck where there was evidence that brakes were in use on some trucks of that character was negligence, was a question for the jury.

FAILURE TO SLACKEN SPEED OF CAR.—Whether the driver of the horse car was negligent in not slackening the speed of the car when he could have seen the beer wagon coming out of the yard when the car was sixty or seventy feet away, was a question for the jury, and a dismissal of the complaint as to the railroad company was error.

**JOINT WRONGDOERS — JUDGMENT AGAINST ONE DOES NOT
RELEASE OTHER.**—The recovery of a judgment against one of two joint wrongdoers is, until paid or satisfied, no bar to the prosecution of an action for the same cause against the other of them.

APPEAL from judgment, Supreme Court Trial Term, Kings County, in favor of plaintiff.

THOMAS F. MAGNER, for plaintiff.

HERBERT C. SMYTH, for appellant.

THOMAS S. MOORE, for respondent.

Plaintiff's intestate, a girl sixteen years of age, was riding in a horse car of the defendant railroad company when she was injured by the pole of a truck of the defendant brewing company piercing the side of the car as the truck was coming out of the brewing company's premises. The injury occurred on December 19, 1893, and she died October 22, 1894.

Suit was brought against both defendants and the complaint was dismissed as against the railroad company. A verdict was obtained against the other defendant for \$3,000.

From the brewing company's gateway to the north-bound track of the railroad, the distance was twenty-four feet and five and one-half inches, and thirty-two feet one and one-half inches to the south-bound track upon which the car was moving. As the car was at the

first cross street, fifty-seven feet away, the driver of the defendant's beer wagon was proceeding to come out of this gateway; and when the car was about opposite that place the pole of the wagon came in collision with the car, pierced the side of it, and struck and injured Miss Hurley. The wagon was a heavy one, weighing nearly two tons, loaded with four and one-half tons of beer in casks. There was a descent in the grade from the gateway into the street.

Although there is some conflict in the evidence as to the manner in which the horses were driven into the street, the conclusion was permitted that they were driven at a rapid gait. The wagon and pole together were twenty-three and one-half feet in length, the outside of the gutter only fifteen feet from the gateway, which is the reason for the statement of the driver that in going from the gateway and turning this truck into the street, the horses would have to go to the south-bound track of the railroad. Without first seeing or knowing that the way was clear to do so, it would seem to have been an act of negligence on the part of the defendant to drive this truck, loaded as it was, with the speed before mentioned, down into the street where cars carrying passengers were liable to be passing on the railroad. The conclusion of defendant's negligence was warranted by the evidence. There can be no imputation of contributory negligence on the part of plaintiff's intestate.

The further question arises, whether or not the death of the plaintiff's intestate was caused by such negligence of the defendant. Code Civil Pro. sec. 1902. In view of the nature of the injury received by her and of the fact that she continued to live ten months after the accident, the question is in some sense one of medical science, and its determination is largely dependent upon evidence of that character. While the time intervening between the injury and the death is entitled to consideration, it is not controlling on the subject of inquiry whether the blow received by the girl was the proximate cause of her death. If there was no intervening, efficient, independent cause to which the death may have been attributed, the effect of death was proximate to the violence as the cause. *Pollett v. Long*, 56 N. Y. 200; *Ehrgott v. Mayor, etc.*, 96 N. Y. 264; *Railway Co. v. Kellogg*, 94 U. S. 469. The view derived from a careful examination of the testimony of the medical witnesses for the plaintiff and defendant is that the question arising upon the conflicting evidence was fairly one of fact for the jury, and that they were permitted to find that the act of negligence complained of was the proximate cause of the death of the plaintiff's intestate. The ruling of the court in the reception of the evidence of a physician was proper. The answer to the inquiry, whether upon the assumed state of facts the

blow could produce consumption, was not speculative in such sense as to render it incompetent.

The question whether reasonable precaution on the part of the defendant required it to supply a brake for the truck was properly treated as one for the jury. Brakes were in use on some wagons of that character.

The appeal taken from the judgment entered upon the dismissal of the complaint as to the defendant railroad company requires some consideration. The evidence tends to prove that the car was moving rapidly, on a descending grade; that when it was sixty or seventy feet from the gateway, the horses drawing the beer wagon appeared to the view of persons on the car and were going at a trot down into the street, and that the rapid movement of the car was not slackened until the collision took place. It is very likely that the driver of the car did not suppose he was approaching a collision. But it cannot be said, as matter of law, that there was no occasion for him to apprehend the possibility that the wagon going with its rapidity towards the track might not turn without reaching it. The question of negligence of the railroad company was for the jury, and the dismissal of the complaint was error.

It is, however, urged by counsel that the plaintiff is not entitled to reversal of the judgment against him, because his appeal is inconsistent with the judgment entered against the brewing company since the action was brought against both defendants jointly. This is not tenable because the judgment is not paid.

Judgment affirmed as to brewing company, and reversed as to the railroad company.

Opinion by BRADLEY, J.

CAMPBELL V. MULLER.

Supreme Court, New York, Appellate Term, January, 1897.

BAILMENTS—INJURY TO HORSE—BURDEN OF PROOF.—Where it was proved that a horse was in good condition when the bailee took possession, the burden was on him to disprove negligence in an action for an injury to the horse that appeared on its return.

AGENCY—LIABILITY FOR UNAUTHORIZED ACTS.—One who, knowing he has no authority, acts as the agent of another, although with no fraudulent intent, is personally liable to the one with whom he deals.

PRACTICE.—When an objection that an action should have been on contract, and not for deceit, is not raised in the court below it will not be considered on appeal.

APPEAL from judgment of Eighth District Court in favor of plaintiff.

KROGH, SIMIS & MURRAY, for appellant.

M. W. DIVINE, for respondent.

The defendant's son-in-law, Mr. Marquand, looked at two horses, one sorrel and the other bay, which the plaintiff had for sale. He selected the sorrel and it was sent to his stable to try. It didn't suit him and he left town without the horse. Defendant afterwards wrote to the plaintiff that the sorrel did not suit his son-in-law. And after a meeting it was agreed that defendant's man should return the sorrel and bring back the bay on a Saturday, to be returned on the following Monday, if it did not suit the defendant, who was an old horseman. It was not returned until seventeen days afterwards, and then came back in a depreciated condition, with a sore on one of its hind legs which necessitated the attendance of a veterinary surgeon at an expense of \$20. Plaintiff, supposing the defendant was the agent of Marquand, sued the latter but was defeated upon the evidence of the defendant in this action and of Marquand, that the transaction as to the second horse was unauthorized by the latter. The plaintiff then brought the present action, charging defendant with fraudulently representing himself as Marquand's agent.

Plaintiff proved damages and that the injury occurred while the defendant had the horse as it left the plaintiff's stable in good condition. The defendant, in defense, claimed that the horse was to remain with him until Marquand returned, and undertook to show that the injury to the horse was owing to no neglect of his. He failed, however, to give any satisfactory explanation as to how the injury happened, so as to exonerate himself from liability. The rule is, that a bailee being in possession of property at the time of injury, and charged with its custody, ought to explain the injury. *Avent v. Squire*, 1 Daly, 347; *Reed v. Crowe*, 13 Daly, 164.

The defendant by his testimony in the Marquand case placed himself in the embarrassing position of acting for Marquand without authority, the obvious effect of which was to exonerate the latter from responsibility in that action and to effectually establish his own liability in this. *Story Ag. sec. 264*; *White v. Madison*, 26 N. Y. 124; *Trust Co. v. Floyd*, 47 Ohio St. 525, 26 N. E. 110; *Simmons v. Moore*, 100 N. Y. 140, 2 N. E. 640; *Taylor v. Nostrand*, 134 N. Y. 108, 31 N. E. 246.

The defendant's chief argument is that the action is for deceit and not on contract. The defendant did not object in the court

below to the form of the action, and it cannot be raised for the first time on appeal. *Taylor v. Nostrand, supra.*

Judgment affirmed.

Opinion by McADAM, J.

MCCARTHY v. ST. PAUL FIRE & MARINE INSURANCE COMPANY.

Supreme Court, Trial Term, N. Y., January, 1897.

MARINE INSURANCE—OVERCROWDING VESSEL.—An insurer is not liable where the policy exempts him for any loss caused by overcrowding, and the insured vessel was licensed to carry forty-five passengers and was carrying eighty-one when it sank, and it was not shown that the overcrowding did not cause or contribute to the accident.

ACTION by John McCarthy against defendant in policy of marine insurance.

DEADY & GOODRICH, for plaintiff.

COWEN, WING, PUTNAM & BURLINGHAM, for defendant.

The action is by the owner of the steam tug *James D. Nicol* to recover \$5,000, for a loss caused by the foundering of the tug just outside of New York harbor on June 24, 1894. The defense is founded on a condition of the policy declaring that the defendant would not be liable for any loss consequent upon and arising from overloading or any violation of the navigation laws and regulations of the United States. The statute provided that it should be unlawful for any vessel to go upon any voyage with a greater number of passengers than such vessel was licensed to carry. Rev. St. U. S. secs. 4464-5. The decision of the inspectors is made conclusive. *Kennedy v. Gibson*, 8 Wall. p. 505; *Casey v. Galli*, 94 U. S. 673. The inspectors had licensed the tug to carry forty-five passengers and upon this voyage she carried eighty-one, besides the crew. This, it is claimed was overcrowding, and made the vessel unseaworthy, causing her to capsize and sink, as a result of which forty-two of the party lost their lives. The sinking was variously described; but the witnesses generally agree that a storm came on, and as it approached the boat lunged with the sea which struck it on the starboard side, throwing the spray over all the decks, and driving the passengers to the port side, whereupon the boat listed in that direction and the returning wave turned it over. The tug was unquestionably overloaded, and, if this either caused or contributed to the foundering,

the loss was a risk expressly exempted from the security of the policy. Whether the policy was avoided by the mere fact of overcrowding it is not necessary to decide. We will assume that to vitiate the policy the accident must have been one "consequent upon or arising from" the overloading or violation of the law referred to.

When the plaintiff proved the loss from a peril of the sea, he was *prima facie* entitled to recover. But when the defendant established that the tug was overloaded, in violation of the statute, the burden was thrown upon the plaintiff to show that the overloading could not have caused or contributed to the accident, but that the foundering resulted from some peril insured against; and no such evidence was produced by the plaintiff.

Where there are two or more possible causes of an injury, for one or more of which the defendant is not responsible, the plaintiff, in order to recover, must show by evidence that the injury was wholly or partly the result of that cause which would render the defendant liable. *Grant v. Railroad Co.*, 133 N. Y. at p. 659, 31 N. E. 220; *Searles v. Railroad Co.*, 101 N. Y. 661, 5 N. E. 66. The tug started on its errand a violator of the law and took the chances of all that followed.

Judgment for defendant.

Opinion by McADAM, J.

KILBANE v. THE WESTCHESTER ELECTRIC RAILROAD COMPANY.

Supreme Court, New York, Appellate Term, January, 1897.

CROSSING STREET CAR TRACKS—COLLISION.—Where the plaintiff's driver, before crossing an electric railway track, looked for approaching cars and saw none, and the hind wheel of the wagon he was driving was struck by a car before he could clear the track, and there was evidence that the car was traveling at a high rate of speed, a verdict for plaintiff would not be disturbed.

APPEAL from judgment of Eleventh District Court in favor of plaintiff.

TIERNEY & HALSEY, for appellant.

HENRY SCHMITT and GEO. H. McADAM, for respondent.

Plaintiff's wagon was damaged by a trolley car running into it while crossing a street. The driver of the wagon testified that when they approached the crossing no car was in sight, that it was first

perceived when their wagon, which was heavily loaded, was upon the tracks; that they attempted to escape, but the hind wheel was struck and the wagon was thrown against the curb and upset. Some witnesses estimated the speed of the car at twenty miles an hour. The rate of speed indicated by the facts as to the distance which the car proceeded after the collision (about a hundred feet), and notwithstanding all the efforts of the motorman to stop it, indicates conclusively the very high rate of speed at which it had been proceeding before the collision and its great distance at the time the plaintiff's driver proceeded to cross. He was, therefore, not chargeable with negligence in attempting to cross, and as the hind wheel was struck, the conclusion is inevitable that the motorman saw the wagon in time to avoid the collision, but took his chances of clearing it without slackening.

Judgment affirmed.

Opinion by DALY, P. J.

SCHALSCHA v. THIRD AVENUE RAILROAD COMPANY.

Supreme Court, New York, Appellate Term, January, 1897.

SUDDEN START OF STREET CAR — PROXIMATE CAUSE OF INJURY TO PROPERTY.—Where it appeared that the plaintiff, a professional violinist, attempted to board a street car that started before he could get both feet on the step, and he was thrown to one side, and his violin case came in contact with a pillar of the elevated railroad and the violin was injured, the company was guilty of negligence and the injury to the violin was the direct consequence thereof.

DAMAGES.—The measure of damages was the expense of restoration of the violin, compensation for the loss of it during the period of disability, and the difference in its value before and after the injury.

APPEAL from judgment of Ninth District Court in favor of plaintiff.

HOADLEY, LAUTERBACH & JOHNSON (H. W. MAYER, of counsel), for appellant.

MAAS & GOLDBERG, for respondent.

Plaintiff, a professional violinist, signaled the gripman of an open car of the defendant to stop, and after the car came to a standstill, grasped the stanchion and placed one foot on the car, but before he could get the other thereon the conductor started the car. The jerky movement of the car in starting threw the plaintiff to one side,

and his violin case struck against a pillar of the elevated railroad, tearing the box apart, and splitting and otherwise injuring the violin.

The proof of these facts was sufficient to justify the jury in finding negligence on the part of the defendant, making it liable. *Ganiard v. Rochester City R. R. Co.*, 50 Hun, 22; affirmed 121 N. Y. 661 (1). See *Kinkade v. Railroad Co.*, 9 Misc. 273; affirmed 149 N. Y. 615 (2). The injury to the violin by the pillar of the elevated structure was the direct consequence of the defendant's negligence and the proximate cause of the injury. *Milwaukee, etc. R. R. Co. v. Kellogg*, 94 U. S. 469; *Lowery v. Manhattan Ry. Co.*, 99 N. Y. 158; *Jex v. Straus*, 122 N. Y. 293, 297.

The general rule in actions for injury to property not caused by malice is compensation commensurate with the loss; this embraces the expense of restoration of the property to soundness, compensation for loss during period of disability and difference between its value before the injury and after the repair. *Hulton v. Murphy*, 9 Misc. 151.

Judgment affirmed.

Opinion by McADAM, J.

SCHMITT v. METROPOLITAN LIFE INSURANCE COMPANY.

Supreme Court, New York, Second Department, January, 1897.

WORKMAN KILLED BY DESCENDING ELEVATOR.—Where it appeared that the plaintiff's intestate was killed while repairing a shaft in defendant's building by a descending elevator that ran frequently but irregularly, and that no warning was given of its approach, although it was customary for one elevator man to give warning whenever he approached where the men were working, and there was evidence that a relief man who ran the elevator at certain hours never gave warning, the question of contributory negligence was for the jury.

EXCESSIVE VERDICT.—Twenty-five thousand dollars is an excessive verdict for the death of an ironworker twenty-nine years old, in good health, earning \$3.50 a day.

APPEAL from judgment of Trial Term, Supreme Court, Kings County, in favor of plaintiff.

C. N. BOVEE, JR., for appellant.

JOHN C. ROBINSON, for respondent.

Plaintiff's husband, Frederick Schmitt, was in the employ of a company that contracted to repair the elevators of the defendant

1. Reported in 5 Am. Neg. Cas. 450.
2. Reported in 6 Am. Neg. Cas. 82.

company. He was the foreman of a gang of men and was struck and killed by a descending elevator, while leaning over into the opening to test some fastenings. During all the time Schmitt had been at work about the shaft, the elevator had been run frequently, but irregularly, by an employee of the insurance company, named Smith, whose habit it was to warn Schmitt and his fellow-workmen, as the elevator approached, to call out for them to look out. This man Smith was relieved at certain hours by another employee of the defendant named Christopher, who testified that he never gave any cautionary signals in the operation of the elevator, and that Schmitt, the deceased, had made trips with him once in awhile, and that he did not give any signal on any of these trips. The plaintiff recovered a verdict of \$25,000. There is no contention that there was not sufficient evidence to warrant the jury in finding that the defendant was guilty of negligence, but it is insisted that the deceased was guilty of contributory negligence. The jury were at liberty to discredit all that Christopher said, and that being so there would be nothing left upon which to base a finding of contributory negligence. The facts would then bring the case within the rule laid down in *Anderson v. Mill Co.*, 42 Minn. 424, 44 N. W. 315, where the plaintiff was injured by being struck by a log while working in a log chute, no signal being given of its approach, although it was agreed that a signal would be given whenever a timber was sent down the slide. In that case the court said: "It was negligence for the company to omit to give the cautionary signal of approaching danger and it was not negligence for the plaintiff engrossed, as he was, in his work, to wholly rely upon it." There was no error in the rulings. The judgment must be reversed, however, unless the plaintiff stipulates to reduce the verdict to \$15,000 and the extra allowance accordingly, in which case the judgment will be affirmed.

Opinion by BARTLETT, J.

MATTHEWS V. DE GROFF.

Supreme Court, New York, First Department, January, 1897.

COAL-HOLE COVERING—INJURY TO PEDESTRIAN.—An action may be maintained against the owner of property for negligence in failing to keep in repair the cover of a coal hole in the sidewalk in front of her premises, whereby a passer-by was injured, without alleging nuisance.

PREMISES OCCUPIED BY TENANT.—The premises being in the possession of a tenant who had covenanted to repair, will not relieve the owner where

there were renewals of the lease and the defect existed at the time of one of the renewals.

APPEAL from judgment, Trial Term, Supreme Court, New York County, dismissing complaint.

T. F. HAMILTON, for appellant.

JOHN M. BOWERS, for respondent.

Plaintiff while walking on the sidewalk, fell through a coal hole or chute. The premises were owned by the defendant, and rented to a tenant who had occupied the premises for several years under a series of leases, each for one year, and containing a provision that all repairs were to be done by the tenant, and at her own expense. The cause of the accident was a defective covering to the coal chute. The covering was examined the day after the accident, and the prongs were rusty, and some were gone. Proof was offered showing that the cover had been in this condition for several years prior to the accident, but was rejected by the court. Proof was also offered to show the condition of the coal hole cover in each of the years preceding the date of the accident, and during the occupancy by the tenant. This also was rejected. From the complaint and what transpired at the trial, it is apparent there can be no recovery unless the negligence of the defendant is shown. There is no cause of action alleged in the complaint founded upon the construction or maintenance of a nuisance in the public street. The distinction between nuisance and negligence is marked. *Dickinson v. Mayor*, etc., 92 N. Y. 584; *McConnell v. Bostelmann*, 72 Hun, 239, 25 N. Y. Supp. 390. The right to recover must be based upon some duty that the defendant owed to the plaintiff as one of the public entitled to the free use of the street and some neglect of that duty by the defendant. The theory is a maintainable one, and the evidence that was rejected was offered with that view and was competent if such duty existed. The duty to keep the sidewalk in reasonably good and safe condition is incumbent upon the city, and for a failure the city would be liable; and where an abutting owner avails himself of a privilege of placing something in the sidewalk which will serve as a convenience to him, he becomes also charged with the duty of seeing that the place is safe. *Whalen v. Gloucester*, 4 Hun, 27 (1).

1. *Whalen v. Gloucester*, 4 Hun, 27, was an action for injuries sustained by falling through a coal hole in the sidewalk in front of defendant's premises because of a defective covering. The court said "A cover becomes a part of the highway or walk and must be

as secure to the wayfarer as the walk itself. The defendant having sought permission to use the street or walk for her private benefit took upon herself the obligations imposed by law upon the corporation and must bear the burden."

There is authority, therefore, for the general proposition that the owner of property is under obligation to keep the cover of a coal hole in the sidewalk in a safe condition, and one suffering from a breach of that duty may maintain an action for the negligence. But it seems to be the rule of law that where premises are demised to a tenant who covenants to make repairs, the liability would not fall upon the landlord. *Edwards v. Railroad Co.*, 98 N. Y. 245; *Wolf v. Kilpatrick*, 101 N. Y. 146, 4 N. E. 188; *Ahern v. Steele*, 115 N. Y. 203, 22 N. E. 193. There is an exception to this rule, applicable here, where the vault or appurtenances are out of repair at the time of the demise. *Anderson v. Dickie*, 1 Rob. (N. Y.) 238 (1).

It was the duty of this defendant to make the appurtenances safe, and the possession by the tenant did not relieve her as the tenant was not in possession under one demise for the whole period. There were new leases from time to time, as each term expired. The owner had the right to ascertain the condition of the premises at the end of each term, and if she did not do so, she failed in the performance of her duty to the public. The court below was wrong in rejecting the testimony offered to show the condition of the cover at the various times.

Judgment reversed.

Opinion by PATTERSON, J.

DELANEY v. YONKERS RAILROAD COMPANY.

Supreme Court, New York, Second Department, January, 1897.

COLLISION BETWEEN TRUCK AND ELECTRIC CAR.—Where a collision occurred between a stage and an electric car, going in opposite directions on a highway, that was impassable, except on the car tracks, for a distance of 400 feet, and the driver first saw the car after he had entered upon the obstructed section, and it was then 600 feet away, the questions of negligence were for the jury and a nonsuit was error.

APPEAL from judgment of nonsuit, Westchester County, in action for damages to plaintiff's stage, horses and harness.

ALLEN TAYLOR, for appellant.

JOHN F. BRENNAN, for respondent.

1. In *Clancy v. Byrne*, 56 N. Y. 133, it was said, "If the premises are in good repair when demised and afterwards become ruinous and dangerous, the landlord is not responsible therefor either to the occupant or to the public

unless he has expressly agreed to repair or has renewed the lease after the need of repair has shown itself. *Todd v. Flight*, 9 C. B. (N. S.) 377, and cases cited."

A collision occurred on a highway between a trolley car of the defendant and the two-horse truck of the plaintiff. A contractor was engaged in repairing the highway in sections of four hundred feet at a time, so that any particular section which he was at work upon was rendered impassable for teams except along the track of the defendant's railroad. The car and truck were going in opposite directions. The driver of the truck testified that after he entered upon the section undergoing repair and where there was no driveway, except upon the railroad track, he perceived one of defendant's cars coming towards him with great rapidity at a distance of from six hundred to eight hundred feet. He stopped his team at once, but the car continued on its way, colliding with the horses and the vehicle to which they were attached, and causing the damage sued for. Just before the collision, and when the car was about twenty-five feet away, the driver of the stage stood up in his place and motioned and shouted to the motorman to stop. He accounted for waiting so long before doing this, that he expected the car to stop. The trial judge dismissed the complaint on the ground that the plaintiff's driver was guilty of contributory negligence "in not ascertaining whether he could pass over that four hundred feet before a car would come along, which had a right to pass over independent of him." This was error. The proof indicates negligence on the part of the motorman, and that the driver was blameless. The case should not have been taken from the jury.

Judgment reversed.

Opinion by BARTLETT, J.

DOING v. NEW YORK, ONTARIO AND WESTERN RAILWAY COMPANY (1).

Court of Appeals, New York, February, 1897.

EMPLOYEE KILLED IN RAILROAD REPAIR SHOP BY SHUNTING OF CAR.—Where an employee, working in a railroad repair shop, was killed by the shunting of a car which crashed into the shop, the employees in which shop could not see the approach of the car, but there was evidence of common practice in shunting cars towards the shops, the question of negligence was for the jury to determine.

APPEAL from judgment of nonsuit granted by the trial court which was affirmed by the General Term of the Supreme Court.

1. Reversing 26 N. Y. Supp. 405.

GEORGE W. RAY, for appellant.

HOWARD D. NEWTON, for respondent.

Plaintiff's intestate was killed on March 3, 1890, while at work in defendant's repair shop, and it is claimed that his death was the result of negligence on the part of defendant. At the trial, when plaintiff's proofs were closed, the court, on motion of defendant's counsel, granted a nonsuit, and the complaint was dismissed, to which ruling the plaintiff excepted. The judgment cannot be sustained if, in any fair view of the case, there was any evidence for the consideration of the jury on the question of defendant's negligence. The proofs established, or tended to establish, the following facts: The deceased was at work repairing a crippled car in the repair shop, which occupied the whole of a building fifty feet wide and about 200 feet in length. Three tracks passed through the shop through doors which were kept closed, and there were no windows on the side where the tracks entered the building from the yard. These tracks ran from the shop out into the yard, and were connected with the main track and other tracks by switches. The three tracks were used for the purpose of moving crippled cars and material into and from the shop to the main and side tracks. The cars were moved by being kicked or shunted by means of force applied to them by engines some distance from the shop, and in that way propelled by the momentum into or near the shop doors, and controlled while in motion by the brakes. On the day that the deceased was killed, some of the men who worked in the yard or about the shops were moving cars on the tracks outside the shop for the purpose of collecting and moving scrap iron. There was a pile of this iron near one of the tracks, about twenty feet from the shop door, and the men wanted to load it upon a car. With this end in view, they placed a car already loaded with 24,000 pounds of scrap iron on one of these tracks at a point about 800 feet from the doors, and there kicked or shunted it towards the shop. The brakeman evidently saw that the force applied would send the car past the pile of iron where they intended to have it stop, and possibly through the doors, and he attempted to control the movement with the brake, but, for some reason, it did not work, and the car ran past the pile of iron, crashed through the doors, and killed the deceased, who was working inside under one of the crippled cars. He had no means of guarding against such a peril, as it was impossible for him to see the approaching car, even if the work at which he was employed would permit him to be on the lookout, since the doors were closed, and there were no windows. The question is whether this was an accident, or the result of some neglect or breach of duty

on the part of the defendant. A loaded car was driven through the door of a workshop filled with busy men, and one of them was killed. That the defendant's workmen, in attempting to move cars in this manner in the yard were engaged in a very dangerous, if not reckless, experiment, cannot well be denied. The danger of the experiment consisted in moving cars in such a way that no one could tell exactly when or where they would stop. If, upon the occasion in question, the force applied was so measured that the car would stop at the pile of scrap iron, the deceased would not have been killed; but if the force applied was sufficient to send it twenty feet further, and it could not be controlled by the brake, the danger to the men inside the shop was so obvious that the manner in which this part of the defendant's work was carried on may very well be characterized as reckless. It may be assumed, what cannot be questioned, that the workmen were doing the defendant's work in a dangerous and reckless manner. But these workmen were doing nothing but what, according to the testimony, they had been doing for years before. If the defendant permitted its employees to carry on its operations upon these tracks outside the shop in such a manner as to endanger the lives of those inside, who could not protect themselves, it failed to discharge to the deceased the duty which the law imposed upon it for furnishing him a reasonably safe place to do his work. The defendant had the power to control and regulate its business. The law imposed upon it the duty of making and enforcing such reasonable rules and regulations for the government of the men in its service as to prevent or guard against injury by one servant to another in so far as that was reasonable and practicable. It could certainly put an end to the practice of propelling cars upon these tracks by a force that could not be controlled, and it could provide for moving them in some other and safer way. In other words, it could change this method of doing the work by making proper rules and regulations to that end. The jury could have found from the evidence that the practice of kicking or shunting cars upon these tracks in the direction of the doors of the repair shop was known to the defendant. The danger to be apprehended from such a practice was so obvious that the defendant, in the proper discharge of the duties which it owed to its employees, was bound to guard against it by proper rules and regulations, so far as that was reasonable and practicable. *Abel v. Canal Co.*, 128 N. Y. 662, 28 N. E. Rep. 663; *Morgan v. Iron Co.*, 133 N. Y. 670, 31 N. E. Rep. 234; *Berrigan v. Railroad Co.*, 131 N. Y. 582, 30 N. E. Rep. 57. When the defendant's employees were known to be doing their work in a reckless and dangerous manner, it was the duty of the master to change the

manner of operation by some regulation or rule. It was bound only to reasonable care in this respect, it is true, but the danger involved in the methods in use was so obvious that the result could well have been anticipated. The plaintiff gave in evidence the published rules of the company, and it is conceded that they contain no provision relating to this subject. The plaintiff attempted to prove the case by witnesses who were in the employ of the defendant at the time of the trial and at the time of the death of the intestate. It is claimed that the testimony of these witnesses establishes the fact that the defendant made and published proper rules on this subject by posting on blackboards or otherwise. The testimony with respect to rules published in this manner was so vague and indefinite that, in view of the fact that nothing of the kind was inserted in the general printed rules, it became a question for the jury to determine, as matter of fact, whether the defendant had ever made or promulgated any proper rules to guard against accidents from moving cars in this manner upon the tracks leading to the shop. If the men in the defendant's employ were acting in violation of a known and established rule, the death of the intestate might be attributed to the misconduct of co-servants. On the other hand, if the men were acting without any known rule or regulation, and simply following a dangerous practice, sanctioned by time and custom, the result might be imputed to the neglect of the defendant in omitting to change the method of doing the work, and adopting a safer one. The trial court could not hold, as matter of law, upon the proofs as they appear in the record, that the defendant performed its duty in that respect, nor that the evidence was of such a character that the plaintiff failed to show any fault in that regard on the part of the defendant. There was evidence for the jury to determine the question of negligence.

Judgment reversed; new trial granted. Gray, J., dissenting.

Opinion by O'BRIEN, J

MCGRANE v. FLUSHING & COLLEGE POINT ELECTRIC RAILWAY COMPANY.

Supreme Court, New York, Second Department, January, 1897.

**COLLISION—ELECTRIC CAR RUNNING INTO VEHICLE THAT WAS
STANDING ACROSS THE TRACK.**—Where a brewery wagon was standing in the night-time across an electric railway track, waiting for a gate leading into the brewery yard to be opened, and a car ran into the wagon,

throwing the driver out and injuring him, the questions of negligence and contributory negligence were for the jury, and a verdict for plaintiff would not be disturbed.

APPEAL from judgment of Trial Term, Supreme Court, Queens county, in favor of plaintiff.

EUGENE L. BUSHE, for appellant.

SAMUEL CAMPBELL, for respondent.

Plaintiff was driving a brewery wagon and about eight o'clock in the evening, according to his testimony, drove upon defendant's railroad track on Second avenue in College Point, until he came opposite to the place for entrance into the brewery premises. He turned his horses to enter, and as the gate was closed, called to a person in the yard to open it, but before that was done the defendant's car came along and struck the wagon on which he was sitting holding the lines, and he was thrown from the wagon and under the car, and received injuries.

The plaintiff testified that he could not turn to go into the brewery premises without having the wagon on the railroad track, and that when he had turned the horses to the gate and stopped, he first saw the car coming out of Thirteenth street into Second avenue. The motorman testified that when he first saw the wagon it was coming towards him, and was seventy-five or eighty feet away; that he stopped the car at Eleventh street, and when he started the car up the wagon was standing across the track. This is in conflict with the testimony of the plaintiff to the effect that the wagon could not have been seen from the car until it had stopped across the railroad track. Another witness testified that he was on the car and that up to the time of the accident, the car was going rapidly. The questions of negligence were for the jury.

Judgment affirmed.

Opinion by BRADLEY, J.

BURNS v. NEW YORK CENTRAL & HUDSON RIVER RAILROAD COMPANY.

Supreme Court, New York, Fourth Department, January, 1897.

COLLISION AT RAILROAD CROSSING.—Where the plaintiff was struck by an engine and testified that he looked before reaching the track and saw no engine, and it appeared that the engine had no headlight and gave no warning of its approach, but the night was almost as light as day at the crossing by reason of the moon and electric lights, and that the track in the direction

from which the engine came could be seen for a long distance from the point where the plaintiff was standing before stepping on the track, and a person about ten feet behind the plaintiff called out to him to look out, but the plaintiff took no heed, he was guilty of contributory negligence and a nonsuit was proper.

EXCEPTIONS ordered to be heard by Appellate Division in first instance on motion for new trial after nonsuit at Trial Term, Orleans County, in action by John Burns.

S. E. FILKINS, for plaintiff.

CHARLES A. POOLEY, for defendant.

Plaintiff and one Johanna Lahey waited at eleven o'clock at night at a crossing in the village of Medina for a freight train going west to pass, and as the rear end was about passing them they stepped upon another track next to the one upon which the freight train was running and were struck by an engine coming from the west. Miss Lahey was killed and the plaintiff received the injuries for which he brings this action. The night was clear. The moon was shining brightly, and the electric lights at the station near by were lighted. The engine that struck the plaintiff was running at the rate of from ten to fifteen miles an hour. It gave no signal of its approach and the headlight was either not lighted or if it was there was a screen or curtain over it for the purpose of not confusing engineers on other trains. The plaintiff testified that the street was "almost as light as day" and that when within three or four feet of the track upon which the engine was running that struck him, he could see up that track to the west almost a mile. Notwithstanding this evidence, the plaintiff insisted that before reaching the track he looked towards the west and did not see or hear anything of the engine, and did not know of its proximity until he was struck. Another couple were about ten feet behind the plaintiff and Miss Lahey, and the gentlemen who was a witness for the plaintiff called out, "Look out, Burns, or you will get killed," but the plaintiff, instead of heeding the warning, stepped upon the track and was struck. The plaintiff was and had been for years in the employ of the defendant as a track repairer, and was familiar with the crossing and of the manner in which trains were run on the road. So far as the negligence of the defendant is concerned, the evidence was sufficient to raise a question of fact for the jury. But the conclusion is irresistible that if the plaintiff had looked to the west just before stepping upon the track he must of necessity have seen the approach of this engine in ample time to have avoided coming into collision with it (1). The

1. This court recently held "that where it appeared without contradiction that a person in attempting to cross a railroad track looked in each

case, in our opinion, comes quite closely within the principle laid down in *Cordell v. Railroad Co.*, 75 N. Y. 330; *Daniels v. Railroad Co.*, 125 N. Y. 407, 26 N. E. 466.

Judgment upon nonsuit ordered in favor of defendant.

Opinion by ADAMS, J.

FARLEY v. MAYOR, ALDERMEN AND COMMON- ALTY OF THE CITY OF NEW YORK.

Court of Appeals, New York, March, 1897.

TRUCK STANDING IN STREET—COLLISION WITH FIRE HOSE CART—INJURY TO FIREMAN.—Where it appeared that a fireman, the driver of a hose cart, was injured, while driving to a fire in the night-time, by the hose cart colliding with a truck that had been left standing in the roadway, next the curb, every night for several months, to the knowledge of the policeman on duty, the question of the city's negligence was for the jury, and a nonsuit was error.

SPEED OF FIRE ENGINES IN CITY.—Sec. 1932 of the consolidation act, regulating the speed of horses in the streets, has no application to fire engines, on the way to fires.

DANGEROUS EMPLOYMENT.—Although the driver of a hose cart took the usual risk of an employment of a dangerous character, he did not assume the risks of the insecurity of streets, resulting from culpable negligence of the city.

APPEAL from a judgment of the Appellate Division, First Department affirming a judgment dismissing the complaint. About 1:30 on the morning of November 20, 1892, while the plaintiff was connected with the fire department of the city of New York, in the capacity of hose driver, an alarm of fire was sent in to the fire house. The plaintiff drove off to the fire, and while going through Broome street the hose cart that he was on struck a truck and he was thrown off his seat to the ground and rendered unconscious, and remained

direction before stepping on to the track upon which the accident happened, the question of contributory negligence was one of fact and not of law, although the statement of the party might itself seem to be highly improbable." *Seeley v. Railroad Company*, 8 App. Div. 402, 40 N. Y. Supp.

866; citing in support, *Greany v. Railroad Co.*, 101 N. Y. 419, 5 N. E. 425, in which it is said: The plaintiff is not bound to see. He is bound to make all reasonable efforts to see that a careful prudent man would make in like circumstances. He is not to provide against any certain result.

so for five days. He was confined to the hospital for two months. On September 20, 1893, he was retired on half pay, \$600 a year.

CHARLES STECKLER, for appellant.

FRANCIS M. SCOTT and WILLIAM H. RAND, JR., for respondent.

ANDREWS, CH. J.— We think the case should have been submitted to the jury. The evidence would have authorized a finding that for several months preceding the accident the truck against which the hose cart collided had been, to the knowledge of the policemen on duty, left during the night-time standing in the roadway on Broome street next to the curb, at or near the place where it was at the time of the collision, and that no report had been made by the policemen of the fact, nor any measures taken by the public authorities by notice to the owner or by proceedings to enforce the penalty given by the ordinance to remedy the nuisance. The truck was an obstruction to the street, and both at common law and by the ordinance the using of the street for the storage of the truck was an illegal act. *Cohen v. Mayor, etc.*, 113 N. Y. 535; ordinance of City of New York, art. 4, sec. 33. It is, moreover, made the duty of the commissioner of public works, by section 324 of the Consolidation Act (Laws of 1882, chap. 410), to remove or cause to be removed all unharnessed trucks found in a public street in the night-time, unless there by permission of the mayor. The storing of the truck in the street was the act of the owner, without authority from the city, and the rule applies that in order to charge a municipality for an injury happening to a third person using a street therein, from an unlawful obstruction placed therein by a stranger without authority, it must appear that it had notice, express or implied, of the existence of the obstruction before the accident, and that a reasonable time had elapsed subsequent to the notice and before the injury, during which it could have abated the nuisance. Until it had received such notice, and an opportunity had been afforded in the exercise of reasonable diligence, for the city to have acted, there would be no breach on its part of the duty resting upon municipal corporations to use all reasonable care to keep the streets in a safe condition for travel. It is undoubtedly true, as a general rule, that a municipality is not called upon to anticipate infractions by third persons of the law or ordinances relating to its streets, enacted to secure their safety and an unobstructed right of passage. But in this case the custom of the owner of the truck to leave it in the street at this point during the night-time had existed for several months before and up to the time of the accident, and was known to the patrolmen on the beat. It was not the case of an isolated trespass, which a public officer might reasonably suppose would not be repeated, but

a continuous invasion of the public right, habitually indulged in and known to the public officials. They had just reason to believe that the practice would be continued unless the city authorities interfered to stop it, and what the policemen knew the city is chargeable with knowing after the lapse of a reasonable time to enable information to be communicated by them to their superiors. This is not like the case of *Breil v. City of Buffalo*, 144 N. Y. 165, where the only possible fault charged against the city was that it failed to remove or guard a pile of earth left in the street on a single night by the owner of adjacent property engaged in filling in his lot, of which the city had no actual notice and no constructive notice, unless the fact that the lot owner was engaged in filling in his lot with earth deposited in the street in the daytime, and which on each day, except in the one instance, was removed during the daytime, made the city liable for an injury caused by the obstruction. If the pile of earth had been suffered to remain in the street for weeks, and the city had remained inactive, a different question would have been presented.

The question of the contributory negligence of the plaintiff was one also for the jury. It is manifest that section 1932 of the Consolidation Act can have no application to the speed at which engines or hose carts connected with the fire department shall be driven when going to a fire. This section is not in the chapter regulating the fire department. By another section the vehicles of the fire department are given the "right of way" at any fire over all other vehicles except those carrying the United States mail (sec. 444). The safety of property and the protection of life may and often do depend upon celerity of movement, and require that the greatest practical speed should be permitted to the vehicles of the fire department in going to fires. Section 1932 was intended to regulate the speed of horses traveling on the streets and using them for the ordinary purposes of travel, and in the nature of the exigency cannot apply to the speed of vehicles of the fire department on their way to fires. The conduct of the plaintiff was for the consideration of the jury. He took the usual risks of an employment of a dangerous character, but he did not assume the risks of the insecurity of streets resulting from the culpable negligence of the city. He was bound in driving to exercise the care which a prudent person would ordinarily exercise under similar circumstances. It was for the jury to say whether he was alert on this occasion, watchful to avoid obstructions which might be in his path, and whether there was any omission on his part of reasonable circumspection and diligence which contributed to the accident.

Having reached the conclusion that the case was improperly withheld from the jury on the facts, both as to the negligence of the defendant and the contributory negligence of the plaintiff, the judgment should be reversed and a new trial ordered.

All concur.

LEVITT v. NASSAU ELECTRIC RAILROAD COMPANY.

Supreme Court, New York, First Department, February, 1897.

EXCESSIVE VERDICT FOR INJURIES.—A verdict of \$4,300 was excessive when the plaintiff, a boy seventeen years of age, would probably entirely recover from injury in three or four years, although he suffered considerable for some months, and it appeared that his earning capacity was from \$10 to \$12 per week before the accident and \$4 to \$5 after it.

APPEAL from judgment Supreme Court, Trial Term, New York County, in favor of Nathan Levitt, an infant, in action by his guardian *ad litem*. The plaintiff when injured was seventeen years of age, and was employed in a silversmith's shop where he earned from \$10 to \$12 per week. He had returned to his employment at the time of the trial, but was only able to earn from \$4 to \$5 per week.

J. C. CHURCH, for appellant.

W. GROSSMAN, for respondent.

VAN BRUNT, P. J.—This action was brought to recover damages alleged to have been sustained by the infant plaintiff, resulting from the negligent management by the defendant of its railroad, upon which he was a passenger. Upon the trial of the case the defendant admitted the negligence which resulted in the injuries to the plaintiff, and such trial thereupon became simply an assessment of damages. Proof was taken tending to show the injuries which the plaintiff had sustained, and the jury rendered a verdict in his favor for the sum of \$4,300. A motion having been made for a new trial, which was denied, from the judgment and order thereupon entered this appeal is taken.

It seems to us, upon an examination of the evidence, that the damages were excessive. It is true that the infant plaintiff was injured, and endured considerable pain and suffering, and was prevented from pursuing his ordinary avocations. The accident in question happened in June, 1896, and in October, 1896, the case was tried. At the time of the trial the plaintiff had not entirely

recovered, but was suffering inconvenience in his urinary organs. There was no evidence, however, that the injury in question would be permanent. He was then earning about half the wages which he had earned before, and it appeared that the probabilities were that in three or four years he would entirely recover. Under these circumstances, the verdict of the jury seems to have been considerably more than compensatory, and we think a new trial should be granted unless the plaintiff stipulates to reduce the verdict to \$3,300.

The judgment and order should be reversed, and a new trial granted, with costs to the appellant to abide the event, unless the plaintiff stipulates to reduce the judgment to \$3,510.97, in which judgment, as so reduced, affirmed, without costs to either party.

WILLIAMS, PATTERSON and INGRAHAM, JJ., concur.

O'BRIEN, J. (dissenting).—The amount of damages was a question peculiarly within the province of the jury, and even though we might, upon the same facts, had the question been presented to us, have given a little less, I do not think we should usurp the functions of the jury in a case where there is nothing to show that they were actuated by bias, prejudice or passion. I, therefore, dissent.

NICHOLS v. NORFOLK AND CAROLINA RAILROAD COMPANY.

Supreme Court, North Carolina, February, 1897.

PERMANENT DAMAGE TO LAND — PLEADING.—An allegation in a complaint that the fertility of the plaintiff's land was almost wholly destroyed, and thereby rendered unfit for agricultural purposes, was notice to the defendant that the action was for permanent damages.

STATUTE OF LIMITATIONS.—The act of 1895, chapter 224, limiting actions against railroad companies for damages caused by construction of railroad or repairs thereto to five years, does not apply to actions commenced before its passage, the limitation prior thereto being twenty years.

APPEAL from judgment for plaintiff rendered in the Superior Court, Bertie County.

JOHN L. BRIDGERS and GEO. COWPER, for appellant.

FRANCIS D. WINSTON, for appellee.

This was an action to recover damages for the overflowing of plaintiff's land, due to alleged negligent construction of defendant's railroad. The allegation in the complaint that the fertility of the plaintiff's land was almost wholly destroyed, and thereby rendered

unfit for agricultural purposes, was notice to the defendant that the action was for permanent damages. The jury were properly instructed that the action would be barred only by the lapse of twenty years. Following *Parker v. Railroad Co.* (N. C.) 25 S. E. Rep. 722, which action, like the one at bar, was begun before the passage of the act of 1895, c. 224, where the limitation for an action against the railroad company "for damages caused by the construction of said road or repairs thereto," is reduced to five years. A reasonable time must be given for the commencement of an action before the statute works a bar, and this action having been instituted before the passage of the act in question, is not affected by it.

Judgment affirmed.

Opinion by CLARK, J.

HARDISON v. ATLANTIC AND NORTH CAROLINA RAILROAD COMPANY.

Supreme Court, North Carolina, February, 1897.

STATUTORY ACTION—KILLING OF COW—DIRECTING VERDICT.—

It is error to direct verdict for defendant in an action for negligent killing of cow, where plaintiff brought action, under Code, sec. 2326, within the statutory time, and the defendant introduces evidence to show that it was not negligent, as the question of negligence was for the jury.

APPEAL by plaintiff from judgment entered for defendant in the Superior Court, Craven County.

L. J. MOORE and D. L. WARD, for appellant.

P. M. PEARSALL and CLARK & GUION, for appellee.

Action commenced in the court of a justice of the peace to recover damages for the killing of a cow. Plaintiff's evidence showed that defendant's train killed the cow and that the action was commenced within less than three months thereafter. Defendant introduced evidence to show there was no negligence on its part. Thereupon the court instructed a finding for defendant. This instruction was error. The plaintiff having showed the killing and that the action was commenced within less than six months thereafter, made a *prima facie* case of negligence under the Code, sec. 2326, and the defendant, having introduced evidence to show that it was not negligent, an issue of fact was raised which was for the jury to determine.

Error, and new trial.

Opinion by FURCHES, J.

MESIC v. ATLANTIC AND NORTH CAROLINA RAILROAD COMPANY.

Supreme Court, North Carolina, February, 1897.

HORSE KILLED AT CROSSING—NEGLIGENCE OF DRIVER.—Where plaintiff's servant while driving failed to look for an approaching train at a crossing and the horse was struck by a train and killed, the railroad company was not liable.

APPEAL by plaintiff from Superior Court, Craven County.

DAVID L. WARD and L. J. MOORE, for appellant.

P. M. PEARSALL and CLARK & GUION, for appellee.

Action by plaintiff for damages for the alleged negligent killing of his horse at a railroad crossing. The railroad track was in part the outside boundary of the city of Newbern. The horse driven towards the city by the plaintiff's servant, just as the track was reached at the crossing, was struck on the head and killed by a passing train. It appeared that the driver did not look, as he approached the crossing, for an approaching train. There was no testimony that he listened for any signal from the engineer, though he said he did not hear the whistle or the bell. There was no obstruction of any kind between the crossing and the depot from which the train started out, and the driver, if he had looked ahead, could have seen the train all the way from the time it left the depot. Just as the driver approached the track, he was called by some one behind him, and he looked back, and the next moment the horse, still going on, was knocked down by the passing train. The engine had passed before the animal was struck. He was first hit by the car next to the engine and killed by the rear car. A demurrer was properly sustained to the evidence. The servant's conduct was the proximate cause of the collision by which the horse was killed. He gave no attention to his surroundings. There was nothing to threaten the safety of the horse if he had only exercised a half-reasonable foresight. The railroad company was not liable.

Opinion by MONTGOMERY, J.

THOMPSON v. PEOPLE'S TRACTION COMPANY.

Supreme Court, Pennsylvania, February, 1897.

KILLED ON TRACK—CONFLICT OF EVIDENCE—FACTS FOR JURY TO DETERMINE.—In an action to recover damages for the death of a person killed on the railroad track due to the negligent management of one of defendant's trains where there was conflicting testimony as to the facts, the refusal to take the case from the jury was proper.

APPEAL by defendant from judgment for plaintiff rendered in the Court of Common Pleas, Philadelphia County.

DIMNER BEEBER and HAMPTON L. CARSON, for appellant

THOMAS D. FINLETTER and GEORGE S. GRAHAM, for appellee.

Action by plaintiff to recover damages for the death of her husband, caused by alleged negligence of defendant. The trial judge refused to grant defendant's request to take the case from the jury, in doing which there was no error. Neither was there error in the following charge: "The issue now, as developed by the argument of counsel, is the assertion made by the plaintiff that Thompson's wagon was in the track, and was just about leaving the track, when it was struck. The defendant's side of the case is that Thompson had taken his wagon out of the track, and was turning towards the track when the thing happened. It is apparently conceded, if you take the plaintiff's view of the case, the plaintiff has good reason to ask for a verdict, or, if you take the defendant's view of the case, your only duty would be to give a verdict for the defendant. In other words, the argument in the case seems to have come down to that one question." The charge was impartial, and sufficiently specific. The findings of fact were for the jury, and their verdict was warranted by the evidence.

Judgment affirmed.

Opinion PER CURIAM.

FORD v. KNIPE.

Supreme Court, Pennsylvania, February, 1897.

EXPLOSION—EVIDENCE—DIRECTING VERDICT.—Where there was some evidence of negligence in an action for personal injury sustained by an explosion, the facts were for the jury to determine, and refusal to direct verdict for defendant was proper.

APPEAL by defendant from judgment for plaintiff rendered in the Court of Common Pleas, Montgomery County.

EDWARD F. KANE, for appellant.

N. H. LARZELERE and N. D. TYSON, for appellee.

It appeared that "on August 14, 1895, the plaintiff, Charles Ford, was lawfully in the building where defendant's mill was located. He was standing about twelve or fifteen feet away from it, when suddenly there was an explosion. The stones burst, breaking the iron casting that enveloped them, and many pieces of stone and iron were thrown with great force in every direction. Several of these pieces struck the plaintiff,—one of them with sufficient force as to cause a compound fracture of both bones of his leg. In the room with the plaintiff at the time of the explosion were two other persons,—William Ott, the engineer in charge, and George W. Crockett, another workman of the defendant. To prove negligence on the part of the defendant and his employees, the plaintiff, at the trial, testified that while the burrs were running very fast the man that was running the mill came in, stepped up to the hopper, reached up, pulled a paddle out, and let corn go into the hopper; that the man in charge then started out, but before he got to the door the explosion occurred. He could not tell how many revolutions the mill was making in a minute. He could not see the burrs, but saw the wheel above, and it was running very fast. William Ott, the engineer in charge at the time, testified on behalf of the plaintiff that the mill was running faster than it ought to,—how fast it was running, or how fast it could run, he could not say; that he pulled out the paddle, and left the corn down, to check its speed; that as soon as he did this he started for the engine, to shut off steam, but before he got more than twelve or fifteen feet away, the explosion took place; that it was about fifty or sixty feet from the mill to the engine; that he was inexperienced as an engineer; that he was employed regularly as the engineer in the latter part of July, and continued to run the engine from two to three days a week from that time up to the time of the explosion; that before his employment as the regular engineer he ran the engine on a few occasions; that on the morning of the explosion he lighted the fire under the boiler, and when he got up steam, which was at about nine o'clock, he started the engine; that when he did so the governor refused to move and he pushed it around twice with his hands; that then the governor worked all right, and the engine ran regularly; that the engine was running all right, and the governor was going around properly, when he left the engine-room to go to the mill; that he went from the engine-room to the mill, put the burrs together, and left the corn down; that he turned around to go

out to the engine to stop it, and the mill exploded; that he immediately ran to the engine, and found it running fast and the governor standing still; that he never saw the governor stop before while the engine was running; that the engine was running faster than he ever saw it before,—how fast, he could not say, but it was not jumping; that in the afternoon, several hours after the explosion, he worked in the engine-room; the engine was running, and George W. Crockett had it in charge; that on one other occasion, when the engine was first started, he saw the engineer who preceded him start the governor by giving it a push with his hands. On behalf of the defendant, it was testified by George W. Crockett, who was in the mill-room when the explosion occurred, that the mill was running regularly at the time of the explosion; that it was making from 800 to 900 revolutions to the minute; that he went to the delivery spout in order to ascertain how the mill was grinding; opened the slide; felt the feed as it came through; could tell that it was being ground at the rate of twenty-five or thirty bushels per hour, which would also indicate that the mill was not making more than 900 revolutions per minute; that the mill was running regularly several minutes before the explosion occurred; that he had run an engine for two years in a grinding mill before he was employed by the defendant. The defendant and his foreman testified that they never knew of the engine being out of order, or of the governor refusing to operate. Three experts, who were called in to examine the engine after the explosion, examined all its parts, and found everything in good working order, including the governor." At the conclusion of the evidence defendant requested direction for verdict, which the trial court refused.

The question whether or not the bursting of the burr stones was due to any negligence of the defendant was, of course, a question of pure fact. It was exclusively within the province of the jury to decide it, if there was any evidence more than a scintilla in the cause. There was evidence both as to the condition of the engine and governor, and the running of both of the burr stones and the engine, which was claimed to prove negligence. We cannot say, as matter of law, that this evidence was no proof whatever on this subject. That could only be determined by the jury as a matter of fact. The question was carefully and correctly submitted to the jury by the learned court below, and we cannot say that this action of the court was erroneous.

Judgment affirmed.

Opinion PER CURIAM.

HOVENDEN v. PENNSYLVANIA RAILROAD COMPANY.

Supreme Court, Pennsylvania, February, 1897.

KILLED ON TRACK—CONTRIBUTORY NEGLIGENCE.—Where a person steps upon a railroad track immediately in front of an approaching train, and is instantly struck and killed, a nonsuit was proper, as there was clearly contributory negligence.

APPEAL from judgment for defendant rendered in the Court of Common Pleas, Montgomery County.

N. H. LARZELERE and M. M. GIBSON, for appellant.

CHARLES H. STINSON, C. HENRY STINSON and WILLIAM F. SOLLY, for appellee.

According to the opinion of the court below, the case substantially is as follows: "The husband of plaintiff approached a railroad crossing and stopped to allow a receding train on a west-bound track to pass. This train obscured his view of the other track for a considerable distance. Without waiting for the receding train to pass a sufficient distance to permit him to see a coming train on the other track, he started to cross, and, before he put foot on the east-bound track, he was struck. Had he waited a few seconds, he could have seen the train; or, had he looked when on the west-bound track, he could have had a clear view for at least 292, if not 430, feet, and thus have seen the coming train; or, had he looked before taking his last step, he must have seen the engine, for it was right upon him. We are, therefore, of opinion that the nonsuit was properly entered, and now, December 7, 1896, the motion to take off the nonsuit is overruled."

We are clearly of opinion that this case comes within the line of decisions that where a person steps upon a railroad track immediately in front of an approaching train, and is instantly struck and injured, he is conclusively guilty of contributory negligence, and can recover nothing for the consequences. The deceased either ran against the engine or was just in the act of stepping on the track when he was struck. We think the nonsuit was properly granted, for the reasons stated in the opinion of the learned court below.

Judgment affirmed.

Opinion PER CURIAM.

**SCHULTZ v. BEAR CREEK REFINING COMPANY,
LIMITED.**

Supreme Court, Pennsylvania, March, 1897.

EMPLOYEE INJURED BY MACHINERY — ACCIDENT — DIRECTING VERDICT.—Where an employee was injured by machinery and it was shown that there was nothing defective or unusual in its fastenings, defendant is not liable for the accident, and a direction of verdict for defendant was proper.

APPEAL by plaintiff from judgment rendered for defendants in the Court of Common Pleas.

W. B. BROOMALL, for appellant.

V. GILPIN ROBINSON and ALFRED DRIVER, for appellees.

In its charge to the jury the court below said: "I am unable to find any sufficient evidence of negligence upon the part of these defendants to render them liable to this unfortunate man for the injuries he has received. It is the result of one of the accidents of life for which we are too liable, but it is not an accident that somebody must pay for; the duty is upon the plaintiff to show that there was some negligence upon the part of his employer. They seem to have given him all the instructions they could. He is an adult man. He does not speak the language, but the evidence is that he understands it a little; and, as I said before, anybody that knows anything about foreign languages knows that you can distinctly comprehend a language without being able to speak it; and a man who has been in this country for a year or two, mingling with business men and tradesmen, would probably understand the language, though he might not be able to speak it or be examined in it. The defendants here appear to have done all that was necessary to instruct this man in the use of this machine at which he was put to work. It was his duty, therefore, to protect himself against any danger. The only question upon which I have had any doubt is the manner in which the machine was fastened to the floor. If it was put down as the witness Kiesel first testified, or according to the impression that he gave by his testimony it would, it seems to me, have then been improperly secured. But, upon his re-examination, and upon the examination of the other witnesses who were familiar with the manner in which the machine was put down, it seems to have been attached or fastened to the floor just as other machines of that nature usually are in all factories, or in most of the factories, at least,

in which they are used. An employer is not bound to employ the best means; he must employ the usual, ordinary means for the preservation of the life and limb of his employee; and if a manufacturer employs the usual means, if he has his machinery set up in the usual way, then he is not liable for an accident, because, as I said a moment ago, our world is full of accidents that constantly are happening, and it will not do to say that for every accident that happens the man who is hurt must be paid for the accident. Men must be careful, when they go to work at a machine, how they use it. After hearing all the testimony, I cannot find sufficient evidence of any negligence here upon the part of the defendants to warrant you in giving the plaintiff a verdict. Nor do I find any evidence of contributory negligence. It seems to have been an accident,—one of those things that occur at any time, without our exactly knowing why they occur. It seems to me that it was a pure accident, resulting, perhaps, from something that was done. We do not know what it was. I, therefore, under the evidence, direct you to find a verdict for the defendants, and to this charge I give a general exception."

We are not convinced that the learned trial judge erred in withdrawing this case from the consideration of the jury, and directing a verdict for the defendants; nor do we find anything in the record that would justify us in sustaining any of the specifications of error. There is nothing in either of them that requires discussion.

Judgment affirmed.

Opinion PER CURIAM.

SCHIVELY ET AL. V. BOROUGH OF JENKINTOWN.

Supreme Court, Pennsylvania, February, 1897.

DEFECTIVE SIDEWALK.—Where a person steps on a board on a sidewalk which was presumably placed there to enable persons to keep out of the mud, and it slipped and the person was injured, the question whether the city was negligent in maintaining such sidewalk is for the jury.

APPEAL by defendant from judgment rendered for plaintiff in the Court of Common Pleas, Montgomery County. The facts sufficiently appear in the opinion.

JAMES B. HOLLAND and JOHN M. DETTRA, for appellant.

M. M. GIBSON and N. H. LARZELERE, for appellees.

PER CURIAM.—In any aspect of this case, it was for the jury. When the plaintiff stepped on a piece of board lying on the sidewalk

to enable persons passing to keep out of the mud, she made use of an appliance presumably furnished by the defendant to facilitate the passage. She did not stumble against it or on it, she simply stepped upon it for the very purpose for which it was intended. But it slipped and threw her over, causing her injury. The question whether this was a negligent maintenance of the sidewalk was necessarily for the jury, and they found that it was. They were certainly at liberty to do this, under the evidence. There is nothing in the allegation of contributory negligence on the part of the plaintiff. She testified that she did not know the condition of the footwalk, and without such knowledge she was certainly not guilty of negligence in using the street.

Judgment affirmed.

SAN ANTONIO STREET RAILWAY COMPANY v. RENKEN ET AL.

Court of Civil Appeals, Texas, January, 1897.

KILLED ON STREET CAR TRACK — EVIDENCE — REBUTTAL.— Where in an action to recover for the death of a person, caused by the alleged negligence of a street car company, it was alleged by defendant that deceased was drunk at the time of the accident, evidence to show the contrary, to the effect that just before the accident there was nothing to indicate that fact, is admissible in rebuttal.

STREET RAILROAD TRACKS.— It is the duty of a street car company to use ordinary care in discovering persons on its tracks while running its cars, and if, through its negligence in failing to keep a watch, a person is killed, the company is responsible, or if it fails to use proper means to stop the car after discovering the person on the track, and the person is killed, the company is responsible.

STREETS — RIGHTS AND USES.— No person or corporation has the right or authority to have the exclusive or paramount use or control over such streets or highways set apart for public use.

DAMAGES.— A verdict for \$5,000 for the life of a healthy young man, who had been supporting his family, although at the time of his death he happened to be out of employment, is not excessive.

APPEAL by the railway company from judgment for plaintiff rendered in the District Court, Bexar County.

W. W. KING, for appellant.

WEBB & FINLEY, for appellees.

Appellees sued appellant to recover damages for the death of John Renken, who, it was alleged, was the husband of Augusta Renken,

the father of Carl W. Renken, and the son of E. Renken and his wife, ——— Renken, and was killed through the negligence of appellant. The residence of the parents of John Renken was alleged to be Zwischenan, Oldenburg, Germany. Appellant filed a general demurrer, general denial, and a special answer alleging that deceased was in a drunken condition when killed, and that his death resulted from his walking in front of an approaching car, and in failing to heed the sound of the gong and the warning given him by the motorman. The case was tried with a jury, and resulted in a verdict and judgment for \$5,000, apportioned equally between the wife and son of deceased, the jury finding that the parents were not entitled to damages. We conclude that John Renken came to his death on the night of February 9, 1896, by being negligently run over and crushed to death by a street car owned by appellant. We find that deceased was walking along the track of appellant's railway, in the city of San Antonio, with his back to the approaching car, and that although deceased was in a place where he should have been seen, and was seen, by the motorman, no signal was given nor effort made to stop the car, which was moving at a rapid rate of speed. Augusta Renken, the wife of deceased, and Carl W. Renken, his son, were dependent upon him for support, but he contributed nothing to the support of his parents, who reside in Germany.

In the bill of exceptions, that part of the deposition of Hattie Williams, in which she testified that John Renken, at or just before the time that he was killed, did nothing that indicated that he was drunk or insane, was objected to because not in rebuttal of any testimony offered by appellant. The motorman had testified that the deceased had walked along by the track, and, although he sounded the gong and called to him, he heeded it not, but staggered onto the track just in front of the car, and was knocked down and killed. Such action would indicate that the man was either drunk or crazy. Again, E. Griff Jones, a witness for appellant, testified that he had, as justice of the peace, refused to allow an autopsy of the body, which appellant desired in order to ascertain if deceased had been drinking intoxicants. Appellant's defense was that deceased was drunk, and remained on the track, and paid no attention to gong or calls of the motorman. The evidence was proper in rebuttal.

A charge was objected to because "it made the defendant company liable in failing to use reasonable care and caution to discover the deceased upon its track, without regard to subsequent negligence in causing his death, and said charge being so framed that the defendant company was required to discover the deceased, even though they used care to prevent injuring him after having discovered

him." We are of the opinion that the charge is correct. It was the duty of the street-car company to use ordinary care in discovering persons on its tracks while running its cars, and if, through its negligence in failing to keep a watch, deceased was killed, the company was responsible, or if appellant failed to use proper means to stop the car after discovering deceased, and deceased thereby lost his life, the company would be responsible. If the death of John Renken was brought about through the negligence of appellant in not using ordinary care in ascertaining if one was upon the track, it would be liable, "without regard to subsequent negligence in causing his death." Its negligence in not discovering the man on the track could not be excused or mitigated by efforts to prevent the death, when its efforts to prevent the death were too late on account of the very negligence in not discovering him sooner.

At the request of appellees the court charged the jury: "A street-car company has no right to the exclusive use of any part of the street upon which its track is laid, and all persons have an equal right to the use of the same for travel over and across the street; and the degree of diligence which the law imposes upon the street-car company is that care which a man of ordinary prudence would exercise under like circumstances." This charge is claimed to be erroneous, and it is insisted that the right of the street car is paramount to that of the public, and that persons have not an equal right to the use of that part of the street used by the street-car company for traveling over and across the streets. A number of decisions of other States are cited in support of this position. Whatever may be the theory in other States, in Texas the streets and public highways are set apart for public use, and no person or corporation can receive the right or authority to have the exclusive or paramount use or control over such streets or highways, or any part of them. The exercise of ordinary care was all that was required by the charge of appellant, and this duty it owed to persons exercising their lawful right in using any part of the street for traveling purposes. There was nothing in the charge to mislead the jury. It was the law of the case. The evidence does not show any contributory negligence upon the part of the deceased, but, on the other hand, shows that the motorman on appellant's car recklessly ran deceased down, and killed him, without attempting to stop the car or give him warning of its approach.

A verdict of \$5,000 for the life of a healthy young man, who had been supporting his family, cannot be held to be excessive. Because deceased happened to be out of employment at the time of his death would not preclude his family from recovering damages for his death,

based on what he had been in the habit of earning. Such a rule would be very unjust to those who lead the lives of employees.

Judgment affirmed.

Opinion by FLY, J.

WILLIAMS v. DEAN.

Court of Civil Appeals, Texas, January, 1897.

PRACTICE—FAILURE TO FILE EXCEPTIONS ON ACCOUNT OF ADJOURNMENT OF COURT—NEGLIGENCE.—Where a judge allowed a party to a suit a certain time to perfect bills of exception, but owing to forgetfulness on his part, he adjourned court one day before the expiration of the time granted, the appellant was not guilty of negligence in failing to file his bills, as he was unable to file same on account of adjournment.

APPEAL from Wilson County Court. Action on contract.

JOHN SEHORN, for appellant.

This was an action to recover on the ground of fraud in contract, but the point as to negligence was on a matter of practice. Motion to strike out the bills of exception, on the ground that they were not approved and filed during the term. The evidence showed that the judge adjourned court one day before the time he allowed appellant to perfect the bills. The failure of the bills to reach the judge in time appears to have been due to his forgetting the bills of exception, and in failing to keep his court open to the time designated. Appellant was not negligent in the matter. On the contrary, the time given was brief, and appellant prepared the bills with due dispatch, and, but for the premature adjournment, the judge would have received and doubtless approved and filed them in time. Under the circumstances appellant is entitled to be relieved, and the only relief that can be afforded is to reverse the judgment and remand the cause. See *Bradford v. Knowles* (Tex. Civ. App.), 33 S. W. Rep. 149, and cases cited.

Judgment reversed.

Opinion by JAMES, C. J.

PATTON ET AL. v. SLADE.

Court of Civil Appeals, Texas, January, 1897.

OFFICER—REMOVING PERSONAL PROPERTY—WHEN NOT LIABLE FOR DAMAGES.—Where a constable of a county, under a writ, removes furniture and effects from a house, he is held only to the use of ordinary

care, and where he uses such care he cannot be held liable for any damage occasioned by such removal.

APPEAL from Jack County Court, where judgment was given for plaintiff in an action against the constable and his sureties. The facts appear in the opinion.

T. D. SPORER and J. S. JONES, for appellants.

HUNTER, J.—This suit was brought by J. T. Slade against W. L. Patton, constable of Jack county, and the sureties on his official bond, to recover damages to household goods, sustained while being removed from a house and lot by the constable, acting under and by virtue of a valid writ of sequestration, issued out of the District Court of Jack county, commanding him to seize and take possession of said house and lot, in a suit of trespass to try title to said premises, brought by Jones against the said J. T. Slade. There is no statement of facts in the record, but the conclusions of fact found by the lower court are as follows: "1. The court finds that the constable, W. L. Patton, defendant in the above cause, at the time plaintiff's cause of action accrued, was acting as constable of precinct No. 4 in Jack county, Texas; that he, as such constable, had in his possession, for service, a writ of sequestration, commanding him, as such officer, to take into his possession the house and lot occupied by plaintiff J. T. Slade and his family at that time, to wit, on March 9, 1889; that said writ was regular on its face, and was issued legally from the District Court of Jack county, Texas, in a cause therein pending, in which Mrs. E. R. Jones et al, were plaintiffs, and J. T. Slade et ux, were defendants. 2. The court further finds that the defendant, in executing said writ of sequestration, was not actuated by any malice or ill-feeling towards the plaintiff herein, and that he, as such officer, did not go beyond the limits of his official authority, but that he executed said writ of sequestration in a legal manner, by dispossessing the plaintiff's family and his household effects from said premises, on the ——— day of March, 1889; that such officer and his assistants, in removing the effects of plaintiff Slade from said premises at said time, used ordinary care and prudence, but in such removal the furniture and effects belonging to said plaintiff were injured to the amount of \$3.75, to wit, quilts, \$2, one chair, \$1.25, and one bedstead, 50 cents, aggregating \$3.75; and that plaintiff is entitled to recover this amount. 3. I find that plaintiff is not entitled to any exemplary damages."

It was the duty of the officer executing the writ to remove the defendant in the writ, and his family and goods and property, bodily, from the premises, unless he consented to and removed of his own accord. In executing the writ by removal of the household goods,

the officer being compelled and forced to do so by the command of the writ, and the refusal of the defendant therein to remove from the premises, he is held only to the use of ordinary care in such cases; and the court having found that he used ordinary care, and did not exceed his official authority and was not actuated by malice or any ill-feeling, he was fully protected by his writ, and the court below erred in rendering judgment against him, under the conclusions of fact found. 2 Freem. Ex'ns (2d ed.) secs. 473, 474. We therefore reverse the judgment herein, and render the same in favor of appellants.

JACKSON v. GALVESTON, HARRISBURG AND SAN ANTONIO RAILWAY COMPANY.

Supreme Court, Texas, February, 1897.

FIREMAN JUMPING FROM ENGINE AND INJURING PERSON ON TRACK — PROXIMATE CAUSE.—Where plaintiff was employed to repair the tracks on defendant's railroad, and while so engaged, an approaching train was signaled, but the engineer, through alleged negligence, failed to stop the train, and when it reached the place where plaintiff was working the fireman, seeing that the track was not in a proper condition to pass over, and fearing danger, jumped from his engine and against plaintiff and severely injured him, the proximate cause of the injury was the negligence of defendant, and a general demurrer to the count alleging the facts stated was improperly sustained.

CERTIFICATE of dissent from Court of Civil Appeals, Fourth Supreme Judicial District. The facts appear in the opinion.

J. M. WATLINGTON and J. A. BUCKLER, for appellant.

UPSON, BERGSTROM & NEWTON, for appellee.

DENMAN, J.—In this case in the trial court, a general demurrer was sustained to the petition, and judgment rendered that plaintiff take nothing. On appeal, the Court of Civil Appeals held that the first count in the petition stated no cause of action, and, upon this question all the judges having agreed, the correctness of its ruling is not before us. But a majority of said court was of opinion that the second count of the petition stated a cause of action, and that the general demurrer should have been overruled, for which reason it ordered that the judgment of the trial court be set aside, and the cause remanded for trial. One of the judges having dissented from such conclusion, on motion of appellee, the dissent was certified to this court, and we are therefore called upon to determine whether

the general demurrer was properly sustained to said count, which is as follows: "Plaintiff charges: That while he was so working on the track of the defendant as aforesaid, and while he was under the control of the said Daily, as the section boss, and while he and others who were there working with him, in the repair of said track, said freight train was expected to soon pass over the part of the road or track upon which they were making the repairs; and, knowing it would soon pass over the same, the said section boss, Daily, sent a flagman in the direction of said expected train, with instructions to signal it to stop before it reached the place at which said work was being done; and that said flagman did signal said train in time for it to stop before it reached the place where the plaintiff was standing, and where the said repairs were being made upon said track, but through the negligence and gross carelessness of the engineer in charge of the engine upon said train, who refused to obey said signal to stop, or failed to see it, through inattention to his duties, said signal was not heeded, and said train did not stop or lessen its speed until it had reached the place where the plaintiff was standing, which place it reached at a great rate of speed, to wit, twenty-five miles an hour; and that, as it approached said place, the said boss, Daily, seeing it was not going to stop, himself again signaled the said train to stop, seeing all of which signals, and knowing the track was being repaired at said point, the said fireman, McCormick, had reasonable grounds for believing, and did actually believe, that said track was not in condition for the train to pass over it, and that it was out of repair, and that some of the rails were out of place, and off the track, and actually believed, and had reasonable grounds for believing, that it would be dangerous for him to remain upon the engine any longer, and that the only way for him to escape the danger he regarded as imminent was to immediately jump from the train, which he did, just as said train was passing where the plaintiff was standing, and, in doing so, jumped upon and against the plaintiff, as stated in the first count of this amended petition, and injured him as therein stated, from which injury he suffered the damages therein stated. That on account of the negligence of the engineer of said train in his failure to heed the said signal, and to stop said train, and on account of the signaling of the same by the section boss and the consequent frightening of the said fireman, the plaintiff was injured by the negligence of the defendant, for which he prays judgment. He charges: That while he was at work at the time and place aforesaid for the defendant, and under the control of the said Daily, he (said Daily), knowing of the approach of said train, sent forward an employee of the defendant, a flagman, to flag said train, and have

it stopped before it reached the place where said repairs were being made, and before it reached the place where plaintiff was standing; and that said flagman did go and flag said train in ample time for it to have stopped before it reached the place where the plaintiff was injured, and the engineer and others in charge of said train did make reasonable effort to stop said train, but were not able to do so, on account of there not being sufficient brakes upon it to stop it with reasonable promptness. That it was a large and long train, composed of nineteen freight cars, and was running upon a down grade; and that there were brakes only upon six of the cars; and that this was not sufficient to the proper management and control of such trains, going at the rate of speed at which the said train was moving, and at which it generally moved. That the reasonable and customary number of brakes for such a train is one to each car; and that they generally are air brakes, and, to insure a reasonable degree of safety to the employees of the defendant and others, there should be upon each car an air brake, which was not upon any of the cars of this train, except six of them. That, on account of the negligence of the defendant in failing to furnish and provide said train with the requisite number of brakes as stated above, the said engineer and the others, brakemen and others in charge of said train, were unable to stop it or lessen its speed, until it had come up to where the plaintiff was standing; and the said fireman, then reasonably apprehending danger to himself on account of his belief that said track was out of repair, so as not to be in condition for the passage of said train over it, in order to escape such supposed danger, jumped from said train against the plaintiff, and injured him as aforesaid, and to his damage as aforesaid, for all of which the defendant is liable to him." The previous portion of the petition had charged that plaintiff was, at the date of the accident, in the employ of defendant, and, as such, engaged with other employees in repairing its track; and the petition also contained a proper statement of the amount of damages plaintiff had suffered, and a prayer therefor.

We are of opinion that the general demurrer to the count above quoted was improperly sustained. The facts stated therein, which must be accepted as true on demurrer, show 1, that plaintiff was rightfully on the ground near the track, and that the fireman was rightfully on the rapidly approaching engine, each being then in the discharge of his duties as an employee of defendant, which was therefore charged with a knowledge of their whereabouts; 2, that, at the time the fireman leaped, the train (whether uncontrolled or uncontrollable we think immaterial) was, under defendant's negligent

management, dashing at a great rate of speed into a place of such apparent danger; that he "actually believed, and had reasonable grounds for believing, that it would be dangerous for him to remain upon the engine any longer, and that the only way for him to escape the danger he regarded as imminent was to immediately jump from the train;" 3, that, impelled by the instinct of self-preservation, he leaped from the engine, colliding with and injuring plaintiff. In *Railway v. Neff*, 87 Tex. 309, 28 S. W. Rep. 283, the following language is quoted from *Cook v. Parham*, 24 Ala. 21: "That the death of the slave may have been the result of fright, or want of presence of mind, occasioned by circumstances of excitement, confusion, and danger brought about by the negligent acts of the defendants, should not be imputed to him as a fault; nor could we regard it in any sense as misconduct if, under like circumstances, one should mistake the best means of safety, and lose his life in the effort to preserve it." And, in the course of the opinion, this court, through Justice Brown, say: "The rule is sound and just which holds the party guilty of negligence responsible for the result, if that negligence has caused another to be surrounded by such circumstances as to him appear to threaten the destruction of his life, or serious injury to his person, whether that person be prudent or imprudent, if, in an effort to save his life, he makes a choice of means from which injury results, and notwithstanding it may turn out that if he had done differently, or had done nothing, he would have escaped injury altogether." In *Railway v. Watkins*, 88 Tex. 26, 29 S. W. Rep. 232, we said: "Where one, by his own wrongful act, has so terrorized another that such other is thereby impelled to do an act resulting in his injury, the wrongdoer cannot shield himself from liability by showing that the person so terrorized did not act as a reasonably prudent person would have acted under similar circumstances." The true ground upon which the acts of a person so circumstanced are not imputed to him on the issue of contributory negligence is that the negligent conduct of the wrongdoer has, for the time being, acquired such a controlling influence over such person that his acts are attributable thereto, instead of to his own volition. His acts, under the circumstances, are, in law, regarded as would be the movements of an inanimate object set in motion by such negligence. If the fireman had also been injured in the collision with plaintiff, there could be no doubt that defendant's negligence would have been the proximate cause, under the principles above stated; and such negligence stands in the same relation to the injuries inflicted upon plaintiff.

GULF, COLORADO AND SANTA FE RAILWAY COMPANY v. ROWLAND.

Supreme Court, Texas, January, 1897.

JUMPING FROM MOVING TRAIN—INSTRUCTION AS TO PROXIMATE CAUSE ERRONEOUS.—An instruction as to proximate cause is misleading and erroneous where the defense alleged contributory negligence on the part of plaintiff in jumping from a moving train, as the issue before the jury was solely as to negligence.

ERROR to Court of Civil Appeals of Third Supreme Judicial District. Judgment for plaintiff (Rowland) having been affirmed, defendant brings error.

MATTHEWS & WOOD, J. W. TERRY and CHARLES K. LEE, for plaintiff in error.

C. B. RANDELL, for defendant in error.

Defendant in error brought suit against plaintiff in error to recover damages for personal injuries, and obtained judgment in the District Court, which was affirmed in the Court of Civil Appeals, to reverse which this writ of error is brought. The plaintiff below, after averring that he became a passenger on defendant's cars destined to a certain station on its line, known as "Lometa," proceeded to set forth the specific acts of negligence of which he complained, in the following language: "Plaintiff alleges that when said passenger train arrived at the station Lometa, it being night and very dark, notice was given by the conductor of said passenger train to plaintiff of the arrival of said train at said station, and plaintiff was notified by him to get off and alight from said train; that immediately after said notice said passenger train stopped at said station, and plaintiff, believing that he could have sufficient time to safely alight from said train, attempted to do so; that while plaintiff was so engaged, in a careful and proper manner, in attempting to alight from said train, and while he was in the act of so doing, the defendant's agents and servants in charge of said train, without any fault or negligence on the part of plaintiff, knowing the situation of plaintiff, so negligently and carelessly conducted themselves in the management and handling of said train and the engine thereof that said engine and train were suddenly moved and jerked, and, without stopping a sufficient length of time in which to allow plaintiff to alight therefrom with safety, were started and put in motion, thereby causing plaintiff to fall and be violently thrown a great

distance against the station, depot platform, and ground, whereby plaintiff was seriously, painfully and permanently injured." No other negligence is charged in the plaintiff's pleading. The defendant, after pleading a general denial, answered specially, in substance, that if the plaintiff was injured at all, his injury was caused by his own negligence "in jumping from" the train while it was in motion. The plaintiff testified, in effect, that when the train reached the station he proceeded to leave it without unnecessary delay, and that as he was descending the steps of the coach the train was suddenly set in motion, and that he was thrown upon the depot platform and seriously injured. On the other hand, there was testimony tending to show that the train stopped a sufficient time for him to have left the car, and that when he did attempt to alight the train was in motion, and had moved some twenty or thirty feet. Therefore the issues were sharply presented, both by the pleading and the evidence: 1. Were the servants of the company negligent in putting the train in motion while the plaintiff was in the act of dismounting? and, 2. Was the plaintiff guilty of negligence in attempting to alight after the train was set in motion? So far as can be seen, there was no question of proximate cause involved in either issue. If the train was negligently started while the plaintiff was in the act of leaving the coach, and if he was, by reason thereof, thrown down and injured, and if he himself was not negligent, he was clearly entitled to recover. On the other hand, if his act in attempting to alight from the train was negligent, it immediately and directly contributed to the resulting injury, and he was not entitled to a verdict. Such being the issues, the court, after having given charges which presented all the phases of the case, and which appear not subject to objection, proceeded to extend or qualify them by additional instructions, extracts of which are as follows: "If you believe that the train was suddenly started as alleged, and had not stopped a sufficient length of time to allow plaintiff to alight from the train, as alleged, and that at the time plaintiff left the train it was in rapid motion, and that the plaintiff recklessly and negligently leaped from or left the train, or that his act of leaving the moving train was such as a man of ordinary care and prudence would not have done, in view of the circumstances, and that his thus leaving the train was the proximate cause of the injury, and that his want of care directly contributed to the injury, then, if you believe the injury, if any, was sustained under these circumstances, you must find for defendant. This, or the immediate foregoing paragraph of this charge, in short, means that a passenger upon a steam car, who voluntarily and without cause exposes himself to danger by

attempting to get off of a car in motion, cannot recover for injuries thus sustained, if his negligence proximately contributed to his injuries. But the mere fact of negligence on the part of plaintiff would not defeat his right to recover, if he otherwise had such right, but the negligence or want of care on his part in thus leaving the car must have proximately contributed to the injury. In other words, if the defendant's negligence was the direct and proximate cause of the alleged injury, and the plaintiff's negligence was the remote cause of the injury, then plaintiff's right to recover, if he otherwise had any, would not be defeated by such negligence. Whether there was recklessness or negligence on the part of plaintiff in leaving the car, under the facts before you, and that leaving was the proximate cause of his injury, or whether defendant's agents and servants were guilty of negligence in the manner alleged, and whether such negligence was the proximate cause of injury to plaintiff, you must determine from the evidence." This instruction was erroneous.

"Proximate cause," literally, means the cause nearest to the effect produced, but in legal terminology the terms are not confined to their literal meaning. Though a negligent act or omission be removed from the injury by intermediate causes and effects, yet, if the party guilty ought reasonably to have foreseen the ultimate consequence, such negligence is deemed in law the proximate cause of the injurious effect. The specific defense of contributory negligence was that the plaintiff "jumped from the train" while in motion. If he did so jump, and he was thereby injured, his act was the immediate cause of his injury, and hence there was no question of proximate cause involved in that issue. Yet the instructions quoted lay paramount stress upon the question of proximate cause in reference to the negligence of the plaintiff as charged in the answer, and present that question, in a pointed manner, in every possible phase of the case. The jury are told, distinctly, not only that if he was negligent, and his negligence was the proximate cause of the injury, he could not recover, but also that, if negligent, and his negligence was not the proximate cause of his injury, he could recover, provided the defendant was negligent as alleged in the petition. The instructions presented a question not made by the pleading and evidence, and their only effect was to confuse and mislead the jury. *Railway Co. v. McCoy* (Tex. Sup.) 38 S. W. Rep. 36. For the error pointed out, the judgment of the Court of Civil Appeals and that of the District Court are reversed, and the cause remanded.

Opinion by GAINES, C. J.

WASHINGTON v. MISSOURI, KANSAS AND TEXAS RAILWAY COMPANY.

Supreme Court, Texas, January, 1897.

KILLED IN A COLLISION—EVIDENCE.—In an action to recover for the wrongful killing of plaintiff's intestate by defendant, there was sufficient evidence to go to the jury on the questions of negligence, where it appeared that there was a collision between two parts of a train, which had become uncoupled, in a certain ravine, whither the deceased had passed shortly before the accident, and that after the accident his body was found near the track, and there was evidence that there were no brakemen or lights on the uncoupled cars, and judgment on verdict directed for defendant was reversed.

FROM a judgment on verdict directed for defendant, which was affirmed in the Court of Civil Appeals of First Supreme Judicial District, plaintiff brings error.

J. D. WOLVERTON and O. T. HOLT, for plaintiff in error.

BAKER, BOTTS, BAKER & LOVETT, for defendant in error.

The facts of the case in evidence are stated as follows by the Court of Civil Appeals:

"The deceased, Mose Washington, who was the husband of the plaintiff, left his home in the latter part of the afternoon of December 31, 1894, telling his wife he was going on a hunt; and when she next saw him, about nine o'clock on the next day, he was dead. She did not know of his ever returning to their house after he left on the afternoon of the previous day, nor did she know anything of his movements or his whereabouts after he left the house. The deceased was seen between six and seven o'clock P. M., on December 31, 1894, walking on the right of way of defendant company, and near to its track, in the city of Houston. He was going east at the time he was seen on the right of way, and on this part of the right of way there is a footpath running by the side of the track of the railway, from the termination of Holly street to a bridge on said track over a deep ravine. This bridge was built by defendant some two years before the trial, and it is so constructed as to admit of an easy passage by footmen, and both this pathway and the bridge had been much used by many people living in the First and Fifth wards of the city. Holly street is west from this bridge, and between this street and the bridge the track of the road passes through a cut of some seven or eight feet in depth. The distance from this cut to the bridge is not shown with certainty, the evidence leaving it in

doubt whether the distance is 100, 200 or 300 feet. In this cut, about seven o'clock P. M. of the 31st of December, 1894, a train moving east upon the railway track, and operated by the employees of defendant, was wrecked, and the next morning, from under the wreck, and lying within two or three feet of the track, the dead body of Mose Washington was found, his head having been severed from his body. There was a flat car in the derailed train, and upon it was an oil tank, and from under this tank the body was taken. Between the place of the accident and the bridge was a switch. But two witnesses testified about the derailment of the train. Both lived next the place. The train was in two sections. The fore section halted for the brakeman to set the switch, and, while this was being done, the rear section of the train collided with the front section, and caused the derailment. The train was a freight train, but how many cars composed it we are not informed by the evidence, nor does the evidence show the number of cars in either section of the train. The train had come uncoupled at some point west of the place of accident, but at what point or what distance from the point of derailment the evidence is silent. The grade of the track coming east was descending from a point several blocks west, but how many is not shown. From the place of the accident, and beyond that point for some distance, the grade going east is ascending. The witnesses observed no brakeman on either the front or rear section of the parted train at the time of the collision and derailment. It was dark, but witnesses could have seen brakemen, or, at least, their lanterns, on the top of the train; but neither would testify affirmatively that there was no brakeman upon either section of the train. They observed neither lights nor men upon the tops of the cars. The evidence gives no explanation whatever of the uncoupling of the train. There is no evidence that the coupling was out of repair, or otherwise defective. There is no evidence that those in charge of the train were aware of the fact that the train had broken into sections until the collision occurred. The time between the halting of the front section and the collision is left in doubt, the witnesses estimating it from three to six minutes. There is no evidence whatever tending to show that the presence of the deceased at or near the point of collision was discovered by any of those operating the train, or observed by either of the witnesses who saw the accident. There is nothing in the evidence tending to show that the collision could have been prevented by those operating the train, had they discovered that the train had parted before the collision occurred."

The action of the court in instructing a verdict for the defendant

is the only ruling of which complaint is made. In order for the plaintiff to recover, it was necessary that she should prove three propositions: 1, That the death of her husband was caused by the derailment of the train; 2, that the derailment was the result of a want of due care, either in the equipment or operation of the train, on part of the agents or servants of the company; 3, that the injury to the deceased, or some injury of a like character to some other person similarly situated, ought to have been foreseen by such agents or servants as a probable sequence of such negligence; and, 4, that he was not a trespasser upon the defendant's track or cars.

There can be no question as to the sufficiency of the evidence to establish the first proposition, and we therefore pass to the second. It may be safely assumed that the derailment was caused by the parting of the train; but whether such parting could have been avoided by the use of proper care, and what regulations are necessary in order to prevent the impact of one disconnected section upon another after the separation has taken place, are questions upon which the testimony throws no light. In our opinion, judicial notice of such matters cannot be taken. But, while the naked fact that an accident has happened may be no evidence of negligence, yet the character of the accident and the circumstances in proof attending it may be such as to lead reasonably to the belief that, without negligence, it would not have occurred. *Railway Co. v. Suggs*, 62 Tex. 323. "Where the particular thing causing the injury has been shown to be under the management of the defendant, or its servants, and the accident is such as in the ordinary course of things does not happen, if those who have the management use proper care, it affords reasonable evidence, in the absence of explanation, that the accident arose from want of care." *Scott v. Docks Co.*, 3 Hurl. & C. 596 (1). See, also, to same effect, *Transportation Co. v. Downer*, 11 Wall. 129. In such a case the question of negligence should be submitted to the jury. The principle is applicable here. Third. Ought the injury to the deceased, or some

1. In *Scott v. London & St. Katherine Dock Co.*, 3 H. & C. 596 (Court of Exchequer Chambers, Hilary Vacation, 1865), it appeared that plaintiff was a customs officer who was injured while upon defendant's docks. While passing before a warehouse he was knocked down and hurt by some bags of sugar that fell upon him from a point where they were being handled by defendant's servants. The court,

on trial, directed a verdict for the defendant on the ground that the evidence was insufficient to establish negligence. *Held*, the court below erred in directing such a verdict. The accident was one that would not ordinarily happen if the defendant had used due care, and the facts, therefore, in the absence of an explanation, would constitute sufficient evidence of negligence to go to the jury.

like injury to some one, have been anticipated by the defendant? Unless this question be answered in the affirmative, there was no actionable negligence in this case. *Railway Co. v. Bigham* (decided at the present term) 38 S. W. Rep. 162. The accident occurred in a city, where the track of the company necessarily crossed its streets, and in a deep cut, through which, as the evidence tended to show, people were in the habit of passing, probably with the tacit permission of the company. Under such circumstances, we think that it cannot be said, as a matter of law, that the company ought not to have anticipated that a derailment of its train within the city might result in a personal injury to some one lawfully on or near its track. The circumstances to support that conclusion may be slight, yet they are some evidence which should go to the jury for their decision. But, conceding that there is evidence tending to show that the path along the track was so used by the public, with the knowledge of the company, that any one walking there should not be deemed a trespasser upon the right of way, are there any circumstances in proof from which the jury could lawfully infer that, at the time the deceased was killed, he was upon the path? It is argued on behalf of the defendant that this conclusion cannot be reached except by drawing one inference from another, which is never allowed. We do not, however, so regard it. The fact that the body of the deceased was found under the derailed car admits of more than one explanation, and there is where the real difficulty arises. The established fact does not necessarily draw with it the fact to be inferred. The deceased could hardly have been on the track itself, because the body would then have been carried beyond the point at which it was found. We understand counsel for defendant to admit as much. But, so far as can be seen from the state of things at the scene of the accident next morning, the fact that his body was found under the car is entirely consistent with the theory that he was riding upon that car at the time the derailment took place. However, there are other circumstances which tend in some degree to show that he was on the path. When last seen alive he was walking there in the direction of the place of the accident, and but a short time before it occurred, and there is nothing in the testimony to suggest that he had an opportunity to mount the train. We recognize the rule that, in order to require an issue to be submitted to the jury, there must be something more than a scintilla of evidence. There must be evidence sufficient to warrant a reasonable belief of the existence of the fact which is sought to be inferred. But we are of the opinion, after mature consideration, that there was more than a mere scintilla of evidence, and that the case ought

to have been submitted to the jury; and we therefore conclude that it was error to instruct a verdict.

Judgment of the District Court and of the Court of Civil Appeals reversed, and the cause remanded.

Opinion by GAINES, C. J.

INTERNATIONAL AND GREAT NORTHERN RAILWAY COMPANY v. CULPEPPER ET AL.

Court of Civil Appeals, Texas, January, 1897.

CONDUCTOR AND ENGINEER OF TRAIN ARE FELLOW-SERVANTS.—

In an action to recover for the death of plaintiff's intestate, engineer of a train, due to alleged negligence of the conductor in failing to flag a train while the deceased was repairing a part of the engine machinery, the negligence was that of a fellow-servant.

APPEAL by the railway company from judgment rendered for plaintiff in the District Court, Smith County.

JOHN M. DUNCAN and T. N. JONES, for appellant.

MARSH & McILWAINE, for appellees.

It appeared that Culpepper was an engineer on one of defendant's trains. Another train was following, which fact appears to have been known to the crew on his train. He stopped his engine over a cattle guard, as was most convenient and customary in such work, in order to go under the engine and remedy a defect, which the evidence shows it was necessary to do in order to prosecute the journey. While under it, engaged in this work, the rear train came up and collided with this train, and he was killed. The court submitted the issues of contributory negligence, and negligence of the conductor in failing to comply with the regulations, and his duty in sending a brakeman back to signal the rear train, for the protection of Culpepper while he was under the engine; and, as bearing on the last-named issue, the court submitted the issue whether or not the conductor and engineer were fellow-servants, the injury occurring while the act of 1891 was in force. The jury found for plaintiff, which involved the finding that the injury was not due to contributory negligence of the deceased, but that the cause thereof was the negligence of the conductor, and that the latter was not his fellow-servant at the time. The errors relate to certain of the charges to the submission of the issue of fellow-servant, under the facts of this case (or, rather, that the evidence clearly showed that they were fellow-servants, and the court should have instructed a verdict for

defendant); and it is also contended that the act of 1891 being repealed in 1893 by the new act on the subject of fellow-servants, requires this case to be considered as at common law, although the latter act contained and continued the same provision as in the former, so far as the issues here involved are concerned. In reference to the last of these questions, we have no hesitation in deciding that the law of 1891 is the law of this case. Its repeal would not affect its force as fixing or determining the liability of defendant in cases which arose under its provisions.

Another theory of liability advanced is that the defendant, at the time and under the circumstances of this accident, owed the engineer the duty of protection against approaching train, and that, having committed the performance of this duty to the conductor, the latter was the representative, agent, or vice-principal of defendant, and his failure to take proper measures to flag the train was attributable to defendant. The principle invoked is the well-known rule that the relation of master and servant imposes on the former certain obligations or duties with reference to the safety of the latter,—for example, the furnishing of safe and suitable appliances or premises, the selection of competent and proper fellow-employees, the establishment and enforcement of proper regulations looking to the protection of servants, and the duty of explanation in certain cases. *Railway Co. v. Farmer*, 73 Tex. 85, 11 S. W. Rep. 156; *Railway Co. v. Smith*, 76 Tex. 615, 13 S. W. Rep. 562. But it is well understood that, in respect to these duties, reasonable care is all that the rule exacts.

No issue is made in this case touching the company's want of care in selecting or retaining the conductor, or in respect to the rules and regulations. This being so, the issue of negligence of the company, as the cause of the accident, is not in the case, unless it be the law that the failure of an employee to obey the rules made for the conduct of the service is imputed to the master. If this were the law, the rule of fellow-servant would have been applicable to few and exceptionable cases. That such is not the law is indicated by the reasoning in *Railway Co. v. Frazier* (Tex. Sup.) 36 S. W. Rep. 433. It seems conceded that the rules were adequate for the safety of the deceased, if the conductor had observed them. The evidence doubtless made the conductor of higher grade than the brakemen, who, it appears, were at all times under his direction. Although he had authority over them, and as to them might have been of different grade, or the master might have been deemed present and acting through the conductor, so that defendant would be liable to them for the conductor's negligence, yet such difference of grade or

constructive presence of the master did not extend to the engineer, under the facts of this case; and we regard his failure to protect the engineer by seeing that the rear train was flagged as his mere personal negligence, and therefore the negligence of a fellow-servant, under the law as it was prior to the statute of 1891. The law was clearly stated in *Railway Co. v. Smith*, 76 Tex. 616, 13 S. W. Rep. 562, and there was as much reason — or more — in that case for holding the roadmaster to be a vice-principal as there is for holding the conductor one in this case, in his relation to the engineer. The statute of 1891, however, defines what constitutes a vice-principal, making such any person, engaged in its service, intrusted by a railway corporation with the authority of superintendence, control, or command of other persons in its employ or service, or with authority to direct any other employee in the performance of any duty of such employee. This provision would seem to preclude any other definition of the term in cases arising under the act. Applying it to the facts of this case, the conductor was not a vice-principal, in his relation to the engineer on the occasion of the latter's injury.

Judgment reversed, and the cause remanded (1).

Opinion by JAMES, C. J.

GALVESTON, HARISBURG AND SAN ANTONIO RAILWAY COMPANY v. PROVIDENCE WASHINGTON INSURANCE COMPANY (2).

Court of Civil Appeals, Texas, January, 1897.

CARRIER OF FREIGHT — MEASURE OF DAMAGES.—Where freight on goods has been paid and the goods are lost, the market-value of the goods at the point of destination, with interest, is the measure of damages, but

1. The court, on motion for rehearing in this case (*International, etc. R. Co. v. Culpepper*), said: "The motion for rehearing insists that there was testimony going to show that the conductor had direction over the engineer at the time of the accident, and hence they were not fellow-servants. The testimony of the witnesses recited in the motion would show that ordinarily the conductor had charge of the train, its movements, and its crew. But the

same witnesses, referring to the condition of things existing at the time of this occurrence, say that the conductor had no control or supervision of the engineer. Therefore we see no reason to change our opinion or conclusions of fact."

Rehearing denied.

2. Decided on the authority of *Galveston, H. & S. A. R. Co. v. Efron* (Tex.), 1 Am. Neg. Rep. 192, *ante*.

where cotton is destroyed in transit, proof as to the contract-price is not sufficient to show the market-value.

COTTON LOST BY FIRE—BURDEN OF PROOF.—In a contract, exempting the carrier from loss by fire, of cotton, the burden is upon the carrier to show that the cotton was destroyed by fire, and that such fire was not the result of the carrier's negligence.

APPEAL by the railway company from judgment rendered in the District Court, Bexar County.

UPSON, BERGSTROM & NEWTON, for appellant.

LEROY & SEHORN, for appellee.

This case is so nearly analogous to the one of Galveston, H. & S. A. R. Co. *v.* Efron, 1 Am. Neg. Rep. 192, 38 S. W. Rep. 639, that they may be considered companions; the only difference being that in this case forty-one bales of cotton were destroyed by fire at Seguin instead of forty-seven, and that the cotton was shipped over appellant's road to New Orleans, and consigned to Henry Neill & Co., who assigned their claim for its value to the appellee. Otherwise the facts in the two cases are the same and the errors assigned identical. Therefore, on the authority of the opinion in the other case referred to, the judgment of the District Court is reversed, and the cause remanded.

Opinion by NEILL, J.

GULF, COLORADO AND SANTA FE RAILWAY COMPANY *v.* WEEMS.

Court of Civil Appeals, Texas, January, 1897.

HORSE KILLED ON TRACK—FENCE—EVIDENCE.—Where a horse was killed by one of defendant's trains, the fact that the animal was killed within the town limits, about 100 yards from the depot, near a side track, was not conclusive proof that the track was not fenced, but the question was for the trial judge to determine.

APPEAL by the railway company from judgment rendered for plaintiff in the Brazoria County Court.

DUFF & SPROLES, for appellant.

ROWE & ROWE, for appellee.

FLY, J.—This suit was brought to recover the value of a horse killed by appellant in the town of Alvin. The case was tried by the county judge, and judgment was rendered in favor of appellee for

§175. Appellant asks that the judgment be reversed because the horse was killed within the limits of the town of Alvin about one hundred yards from the depot, near a side track, and no negligence was shown. The burden of proof was on appellant to show that the animal was killed at a place within the town of Alvin where, under the law, it could not fence its track. *Railway Co. v. Cocke*, 64 Tex. 151; *Railway Co. v. Dunham*, 68 Tex. 232, 4 S. W. Rep. 472. Proof that the horse was killed on a branch road one hundred yards from the depot, on the main line, near a siding, was not conclusive proof that appellant, under the law, could not have fenced the track. The question was one of fact, to be determined by the trial judge, and we conclude that there is testimony to support his finding of fact that neither public necessity nor convenience required the track to be left without being fenced.

Judgment affirmed.

SOUTHERN COTTON-OIL COMPANY v. WALLACE (1).

Court of Civil Appeals, Texas, January, 1897.

MASTER AND SERVANT.—In order to constitute relation of master and servant the person employed must be subject to the orders and control of the employer.

INJURED WHILE BALING COTTON.—Where a cotton-oil company contracted with a person to bale cotton, and the contractor employed men to do his work, and one of the men was injured, the relation of master and servant did not exist between the cotton-oil company and the injured party.

APPEAL by the Southern Cotton-Oil Company from judgment rendered for plaintiff in the District Court, Harris County.

HUTCHESON, CAMPBELL & SEARS, for appellant.

BLAKE DUPREE, for appellee.

William Wallace, a minor, by his next friend, brought this action against the appellant to recover \$20,000 damages for personal injuries charged to have been sustained while in its service. He alleged in his petition that defendant, knowing he was a minor, employed him to serve it in the capacity of a laborer, and put him to feeding one of the presses known as a cotton-seed hull press, which was a dangerous piece of machinery, without informing him of the danger to which he would be exposed in such employment; that while engaged in such

1. A rehearing in this case was denied.

service, and ignorant of the danger incident to it, the room in which the press was situated became dark by reason of defendant's failure to light it at the usual time, which increased the danger of his work; that in consequence of such negligence of defendant, plaintiff's left hand, while feeding the press, was caught by the plunger, and all the fingers severed from it, leaving only the thumb. The defendant answered by general denial, limitation of one year, and contributory negligence. The case was tried before a jury, and resulted in a verdict and judgment in favor of the plaintiff for \$2,000.

The undisputed evidence shows that one John Davis had a contract with the Southern Cotton Oil Company, by which he was to take the company's hull presses, bale therewith the cotton-seed hulls at three cents per bale of one hundred pounds, hire and pay his own hands, the company having the right to inspect the bales when made. Under this contract Davis hired and paid appellee, and directed and controlled him as to where and how he should work. The appellee was not on appellant's pay-roll, paid by it, nor subject to the orders and control of the company. But he was solely in Davis' employ, and working under his direction and control when he was hurt. If the appellee was not, under these facts, the servant of the appellant when he was injured, he cannot recover; for his right of recovery is made by the petition to depend upon the appellant being his master. The relation of master and servant, in its full sense, invariably and only arises out of a contract, express or implied, between the master on the one hand and the servant on the other. In order to constitute such relation, the person employed must be subject to the orders and control of the employer. And the test by which to determine whether a person is acting as the servant of another is to ascertain whether, at the time when the injury was inflicted, he was subject to such person's orders and control, and was liable to be discharged by him for disobedience of orders or misconduct. Tested by these elementary principles, we have no hesitation in saying that the evidence shows that appellee was the servant of John Davis, and not of appellant, when he was injured.

Judgment reversed.

Opinion by NEILL, J.

**TEXAS AND PACIFIC RAILWAY COMPANY v.
TOM GREEN COUNTY CATTLE COMPANY.**

Court of Civil Appeals, Texas, January, 1897.

LIVE STOCK DAMAGED—BURDEN OF PROOF.—The burden of proof does not devolve on a shipper of live stock, who sends a person to look after them, to show, in case of loss, where they were lost, where there is no contract exempting the carrier from liability for damages, not occurring on its own line, nor any contract providing for any one to accompany such live stock.

INJURY TO STOCK—EVIDENCE.—Evidence of a wreck of the cars, on which were plaintiff's cattle, on defendant's road, and that many cattle were injured in the wreck, is sufficient to justify the jury in finding that the injuries were caused by the wreck.

APPEAL from a judgment for plaintiff, rendered in the District Court, Reeves County.

B. G. BIDWELL, for appellant.

Appellee, on April 23, 1889, delivered to appellant at Monahan, Tex., 264 head of cattle to be transported over its line to Ft. Worth, Tex., and thence over a connecting line to Ponca, in the Indian Territory, and there to be delivered to appellee. The record fails to disclose any written contract relating to the shipment. We therefore conclude that none was made, and that the rights and liabilities of the parties must be determined by the common law governing common carriers of live stock in such cases. The cattle were carried by appellant to Ft. Worth, Tex., and there delivered to a connecting carrier, the Gulf, Colorado & Sante Fe Railway Company, which carried them to Ponca, and delivered them to appellee, or such of them as had not been killed or lost in transit. At Midland, Tex., while in charge of the appellant, three cars of one train of the cattle were run into by a west-bound freight train of appellant's, and overturned and smashed, and many of the cattle injured, some killed, and some strayed off; so that out of the seventy-nine head of steers originally shipped in the three wrecked cars, seventy-four head only were delivered to the Gulf, Colorado & Sante Fe Railway Company at Ft. Worth. The whole number of cattle delivered to appellee at Ponca was two hundred and forty-two, showing a loss on the way of twenty-two head. Appellant, by its witnesses, shows nine head lost while on its road. Where the others were lost does not appear. Of the two hundred and forty-two head delivered at Ponca, sixty-six head of steers were damaged. Some had horns knocked off, some legs

broken, some hipped, some with ribs broken. Some of them died shortly after they were delivered, but the record fails to show how many,—probably about six head. The rest of the sixty-six head were so injured and damaged that they were worth about \$7.50 per head, and were sold at Ponca by appellee for this amount. The market-value at Ponca of all the steers shipped was \$20 per head. The twenty-two head not delivered were worth at Ponca \$440. The nine head lost on appellant's road were worth at Ponca, \$180. The sixty-six head received in an injured and damaged condition were depreciated in value \$12.50 per head, amounting to \$825. The verdict for \$850 is not excessive, if the jury believed that the injuries to the cattle shown to exist at the time of their delivery at Ponca were caused by the wreck at Midland.

Appellant complains that the court erred in refusing to charge the jury to the effect that "when a shipper of live stock goes or sends one with the stock shipped, to look after them, it devolves on the shipper, in case of loss, to show where they were lost." We think the court correctly refused this charge, if for no other reason, because there was no contract of shipment exempting appellant from liability for damages not occurring on its own line; nor does it appear that there was any contract providing for any one to accompany the cattle in transit, such as is usually found in printed forms of contracts for the shipment of live stock in use by the railroad companies in this State. Appellant bases its contention upon the evidence of W. M. Allen, a witness for appellee, who says he was a stockholder in the appellee company, and that "Jo Car went with the train of steers. He went with them for, and was representative of, the plaintiff." But it does not appear that by contract or otherwise Jo was to have any care, custody, or control of the cattle. The evidence falls far short of that which is required to cast the burden on the shipper of proving on what line of railroad the injury occurred. But, even if it could be inferred that Jo Car had control and charge of the cattle in transit, appellee does prove a wreck of the three cars of cattle at Midland, on appellant's road, and that many cattle were injured in that wreck. This was amply sufficient to warrant the jury in concluding that the injuries shown to have existed at the time of delivery at Ponca were caused by this wreck, and it consequently devolved upon appellant to show some other cause for such injuries, sufficient to authorize the jury to conclude otherwise.

Judgment affirmed.

Opinion by HUNTER, J.

GULF, COLORADO AND SANTA FE RAILWAY COMPANY v. YOUNGER.

Supreme Court, Texas, February, 1897.

ACTION BY HUSBAND FOR DEATH OF WIFE — REMARRIAGE —

EVIDENCE.—The fact that a husband, who brought action to recover for death of his wife, due to negligence of defendant company, subsequently remarried, does not in any manner operate to mitigate the damages for which the wrongdoer was responsible, and evidence as to such remarriage was properly rejected.

DAMAGES — EVIDENCE.—Evidence of the financial condition of the father, at the time of the death of the mother, is admissible to show the pecuniary injury sustained by an infant daughter, owing to the mother's death.

ACTION by J. A. Younger against the railway company, for damages for death of his wife caused by defendant's negligence. Plaintiff obtained judgment and the defendant company brought error to the Court of Civil Appeals, which court certified questions to the Supreme Court.

W. A. WRIGHT, JOS. SPENCE, JR., and J. W. TERRY, for plaintiff in error.

GUION & TRULY, COCHRAN & HILL and FISHER & TOWNES, for defendant in error.

The Court of Civil Appeals for the Third Supreme Judicial District certified to this court a statement and questions, the main points of which were that plaintiff in the court below had since the commencement of the action for damages for the death of his wife remarried, and that on the trial the defendant sought to prove this fact, in order to show that the second wife could in every respect render every service to plaintiff's child that its mother could have done, and thus the damages were mitigated, but the court rejected the evidence. Defendant also sought to show the financial condition of plaintiff in relation to the damages sustained by plaintiff's minor daughter, by reason of her mother's death, but the trial court refused to allow such evidence. The questions certified to were as to the admissibility of the evidence on the points stated.

To the first question we answer that evidence of the marriage of plaintiff, Younger, after the death of his wife, on account of which he sought to recover damages, was properly rejected by the court. *Davis v. Guarnieri*, 45 Ohio St. 470, 15 N. E. Rep. 350; *Railroad Co. v. Carr*, 57 Ga. 277; *Philpott v. Railroad Co.* (Pa. Sup.) 34 Atl. Rep. 856; *Dimmey v. Railroad Co.*, 27 W. Va. 32. If the plaintiff's

wife was killed through the negligence of the defendant, he then lost the value of her life as a wife; and the fact that her place had been supplied by a subsequent marriage does not in any manner operate to mitigate the damages for which the wrongdoer was responsible. This case is analogous to that class of cases in which the injured party is employed at the time of the injury at certain wages, and by the injury is disabled to perform the services for which he is employed, and, by reason of the injury received, he loses the value of the time during which he is disabled for the performance of the work. In such case the person causing the injury will be held for the value of the time lost, notwithstanding the employer of the injured party may voluntarily continue to pay the wages contracted for during the entire time of disability. *Railway Co. v. Dickerson*, 59 Ind. 317 (1).

To the second question we reply that evidence of the financial condition of the head of the family at the time of Mrs. Younger's death should have been admitted upon the issue of pecuniary injury sustained by the daughter. There are duties which all mothers owe

1. The appellant cited the case of *Railway Co. v. Long*, 87 Tex. 148, 27 S. W. Rep. 113, to support its contention that the evidence of marriage was admissible in this case. In that case it was claimed that the income of the deceased, from which she aided her children, was derived chiefly from her property, and this court held that the evidence was admissible to be considered by the jury, in determining the pecuniary loss sustained by the children, through the death of their mother. The court, speaking by Judge Gaines, discussed a number of propositions bearing more or less directly upon the question before it, and passing from those questions, finally announced its conclusion as follows: "But, however that may be, the case is very different when the only aid which the beneficiaries have received from the deceased, during his life, has been a part of the income of its property, and when upon his death, the title to the corpus of such property absolutely vests in them; and we are, therefore, of the opinion that in a case involving simi-

lar facts, they should be admitted in evidence, to be considered by the jury.' And, after discussing another proposition of law, contended for by the parties before the court, the judge said: "The rule thus announced is doubtless correct, as applied to the facts of the particular case, and it may be applicable generally under the statute of Pennsylvania. It does not apply under the statute of this State to a case like the present, in which the prospective aid was mainly, if not wholly, from the income of property, and in which, upon the death, some of the beneficiaries take by bequest all the estate and others get none." To the extent that the aid given by the mother to the children was derived from income of property, which the heirs received at the mother's death, such aid was not lost by the mother's death. But the fact that the children received property at the death of the mother constitutes no defense against the claims of such children to be compensated for the pecuniary loss sustained by her death. — BROWN, J.

to their children by nature, and which are well expressed by the following quotation: "But infant children sustain a loss from the death of their parents, and especially of their mother, of a different kind. She owes them the duty of nurture, and of intellectual, moral, and physical training, and of such instruction as can only proceed from a mother. This is, to say the least, as essential to their future well-being in a worldly point of view, and to their success in life, as the instruction in letters and other branches of elementary education which they receive at the hands of other teachers who are employed for a pecuniary compensation. * * * The injury in these cases is not 'pecuniary,' in a very strict sense of the word, but it belongs to that class of wrongs distinguished from injuries to the feelings and sentiments; and in my view, therefore, it falls within the term as used in the statute." *Tilley v. Railroad Co.*, 24 N. Y. 476. In the absence of proof, a jury might assess damages in such a case based upon a common knowledge of the manner in which mothers usually perform such duties. *Railway Co. v. Lacy*, 86 Tex. 244, 24 S. W. Rep. 269. It is true, however, that these duties are discharged, and aid rendered to children in various degrees, according to the temperament, education, and other circumstances of the different mothers; and it is proper always to inform the jury of every fact and circumstance which will assist them to determine what aid the child would in all probability have received from the mother in the particular case if she had lived. By this means we approach as near as practicable the actual pecuniary injury sustained by the death of a parent. *Railway Co. v. Leverett*, 48 Ark. 344, 3 S. W. Rep. 50; *Railroad Co. v. Crudup*, 63 Miss. 33; *Wiltse v. Town of Tilden*, 77 Wis. 156, 46 N. W. Rep. 234; *City of Chicago v. Powers*, 42 Ill. 173; *Staal v. Railroad Co.*, 57 Mich. 245, 23 N. W. Rep. 795. The child of the deceased mother is not entitled to recover more or less damages because of the fact that the family was rich or poor; but the circumstances which surround the mother and child are different in wealthy and poor families, and therefore such facts are admissible to show what aid the child could expect to receive from the continuance of the mother's life in the given state of circumstances as surrounded them.

Opinion by BROWN, J.

HUDSON v. UNION PACIFIC RAILWAY COMPANY.

Supreme Court, Utah, January, 1897.

HORSE KILLED ON TRACK—ASSIGNMENT OF CLAIM—RES ADJUDICATA.—Plaintiff in this action assigned to H., for the purposes of a suit thereon, his claim for damages against the defendant company for the killing of his horse. H. brought suit, and, in his complaint, stated two causes of action, in two separate counts, the first count being for the value of his own horse, which was also killed by the said defendant, and the second count for the value of this plaintiff's horse, by right as assignee. A general verdict was rendered in favor of H. on both causes, and judgment rendered thereon for one entire sum. Upon the hearing of a motion for a new trial, H. remitted a sum equal in amount to that claimed for plaintiff's horse, and the defendant afterwards paid the judgment. The assignment had been made an issue, and was declared valid. There was no appeal or reversal of the judgment. The defendant herein set up that judgment as a bar to this action. *Held*, that the plaintiff must be regarded as in privity with H. in the former action, and that he is estopped from again litigating the same claim against the same defendant.

RES ADJUDICATA.—If, in an action, a court had jurisdiction to render a judgment, and such judgment has never been reversed or modified, it is binding on the parties and their privies, and conclusive of the questions litigated; and, if the court has misapplied the law as to any question, the judgment must nevertheless stand until corrected in some appropriate way.

REMISSION.—Where a party obtains a judgment for damages, and voluntarily, without specifying any purpose, remits a part thereof, he abandons his claim to the sum so remitted, and may not afterwards bring an action to recover such sum. Such remission has the effect of crediting the defendant with the amount remitted on the judgment.

(Syllabus by the court.)

FROM a judgment rendered for plaintiff in the District Court, Second District, defendant appeals.

WILLIAMS, VAN COTT & SUTHERLAND, for appellant.

EVANS & ROGERS, for respondent.

The facts in this case and the questions in issue are sufficiently stated in the syllabus by the court.

Judgment reversed with instructions to the court below to dismiss the action.

Opinion by BARTCH, J.

OGLE v. JONES.

Supreme Court, Washington, January, 1897.

MASTER AND SERVANT—EMPLOYEE INJURED IN PIT.—In an action for personal injuries sustained by plaintiff, an employee of defendant, while working in a pit, the failure of the foreman to furnish safe appliances is the failure of the master.

DAMAGES.—A verdict for \$6,500 not excessive, where a person above thirty-five years of age, in full health and vigor, was permanently crippled and his earning ability measurably decreased.

APPEAL by defendant from judgment for plaintiff entered in the Superior Court, Spokane County.

GRIFFITTS & NUZUM, for appellant.

GRAVES, WOLF & GRAVES, for respondent.

In July, 1894, the appellant was engaged in erecting and constructing a system of water-works for the city of Spokane. The respondent was working for the appellant as a shoveler in a pit which was being sunk, the dirt being hauled by means of a cable from the pit to the surface of the ground in a car running up an incline track. The respondent's duty was to remove from the track the dirt falling thereon while the car was being hauled out of the pit with its load. While so engaged, on July 28, the cable by which the loaded cars were hauled broke, causing the car to fall back against and upon the respondent, breaking his thigh, and otherwise severely injuring him. In his complaint respondent alleged that the cable was an old and weak one and unfit for use, which fact was well known to the appellant and to his foreman in charge of the work; that its use, for that purpose, under the circumstances, was negligent and careless; and that the respondent did not know the condition of the cable, or of its unfitness for use, etc. In addition to the general denial of negligence upon his part, the appellant, in his answer, alleged that the injury was due to respondent's own negligence and want of ordinary care, or to the negligence of fellow-servants. A verdict was found for respondent for \$6,500 and judgment entered thereon.

The ruling of the trial court in denying a motion for nonsuit is assigned as error, but an examination of the record did not show such contributory negligence or want of ordinary care on respondent's part as would justify the withdrawal of the case from the jury and the motion was properly denied.

As to the point that the negligence was that of a fellow-servant, the court did not err in instructing the jury as to the master's duty

to furnish safe appliances, and where that duty is entrusted to another the latter becomes his vice-principal, whose failure is the failure of the master. Following the rule in *McDonough v. Railway Co.* (Wash.) 46 Pac. Rep. 334.

The respondent was, at the time of the injury, above thirty-five years of age, and in full health and vigor. In addition to the severe pain and suffering which he endured as a result of the injury, he is permanently crippled, and his earning ability measurably decreased.

The verdict was not excessive.

Judgment affirmed.

Opinion by GORDON, J.

AMBROSE V. GWINNUP ET AL.

Supreme Court, Washington, January, 1897.

ATTORNEY — PLEADING AND PRACTICE — APPEAL.— Failure to file briefs on appeal within the specified legal time cannot be justified on the ground that "other business demanded the attention of counsel," as there were no facts set out to show that due diligence had been exercised by counsel.

APPEAL from Superior Court, Whatcom County. There was a judgment for plaintiff, from which an appeal was taken, but appellants having failed to file briefs, a motion to dismiss the appeal was made to this court by plaintiff (respondent).

D. W. FREEMAN and T. E. CADE, for appellants.

WM. HAMILTON and CHAS. H. HULBERT, for respondent.

Motion to dismiss appeal and to affirm judgment in the lower court on the ground that the briefs of appellants were not filed or served within the time required by law. It is conceded that the time for filing briefs had expired prior to the service of this notice to dismiss appeal, and under the law respondent would be entitled to have dismissal if no excuse were shown for failure to file briefs within the legal time. The only plea in extenuation appears in the affidavit of appellant's attorneys, viz.: "That, owing to other business which demanded the attention of counsel for appellants, they had been unable to get the appellant's brief out and printed within ninety days from and after the date of serving the notice of appeal." This is not any justification at all. No facts are set forth from which the court can determine whether due diligence had been exercised by the attorneys for the appellants.

Motion sustained and judgment affirmed.

Opinion by DUNBAR, J.

FIDELITY AND CASUALTY COMPANY V. CITY OF SEATTLE.

Supreme Court, Washington, February, 1897.

DAMAGE BY DEFECTIVE WATER MAIN—INSPECTION OF PIPES.—

Where a defective water main, in its bursting, damaged the windows of plaintiff's building, the defendant was not relieved from liability on a mere inspection of its water pipes; such inspection must embrace practical tests, but a charge as to reasonable inspection sufficiently covered the ground.

MEASURE OF DAMAGES—INSTRUCTION.—An instruction that the measure of damages was the difference between what the glass broken was worth immediately before the same was broken and what it was worth immediately after it was broken, was proper, where the complaint did not claim further damages.

APPEAL from judgment rendered for defendant in the Superior Court, King County.

BRINKER, JONES & RICHARDS, for appellant.

JOHN K. BROWN and F. B. TIPTON, for respondent.

Spurr & Wilmot, contractors, under their contract with the respondent, the City of Seattle, in preparing Front street and Yesler Way, in the City of Seattle, for paving, uncovered the water main on Yesler Way in front of what is known as the "Olympic Block," belonging to the estate of L. M. Starr, deceased. While engaged in tearing down a foundation wall, they caused a large piece of concrete to fall upon the water main, by reason of which the pipe burst, and a large volume of water, carrying dirt and gravel, was forced against the front of the Olympic Block with such violence that it broke three transom lights and three lower lights of plate glass in said building. For the purposes of this case the contractors will be considered agents and servants of the city. The appellant was the insurer of the glass which was broken, and, after the accident, replaced the same, and paid therefor the sum of \$266.30. Having made good this loss to the Starr estate, it brought this action against the city for damages. Defendant offered no evidence, and the case was submitted to the jury on the evidence of plaintiff, and verdict was rendered for defendant. There are four assignments of error. The first and second are in relation to instructions to the jury. The third is that the court erred in refusing to grant plaintiff's motion to set aside the verdict, and grant a new trial; the fourth, that the verdict is contrary to the evidence.

The first instruction complained of is as follows: "The court

further instructs you that as to the contention of the plaintiff that the water pipe in question was not of such strength and thickness as it should have been for the purposes for which it was used, but was defective and weak, of less thickness than required for pipe used for such purpose; that before the party — the city — can be held liable for such defects, the plaintiff must not only prove that said pipe was not of such strength and thickness as it should have been for such purpose, and that the same was practically instrumental in causing the injury complained of, but must further show, by a preponderance of the evidence, that such defects were known to the defendant at the time said injury occurred, or were of such character and nature as to have been readily ascertained upon reasonable inspection thereof; and if you do find that such pipe was defective in the respects complained of, yet, if you further find that such defects were of such a character as could not have been readily ascertained upon reasonable inspection thereof, and that the same were unknown to the defendant, then you cannot consider such defects." It is claimed that this instruction was misleading, from the fact that it virtually instructed the jury that the only duty of the defendant in regard to the pipe was to look at the same, and, if no defects were visible to the eye, that it was then warranted in placing said pipe where, if it burst, it would cause great damage to property, etc., and perhaps loss of life; and that such cursory examination would absolve the city from liability. It is claimed that the instruction should have gone to the effect that tests should have been used to ascertain the defects in the pipe. We think this objection is far-fetched, and that the appellant has not placed a proper or ordinary construction upon the language used by the court. Inspection is not necessarily confined to optical observation, but is ordinarily understood to embrace tests and examinations. The name "inspector" is given to a person whose duty it is to make tests of machinery, and it is a generally recognized fact that when an officer or agent of any kind is instructed to inspect, the duty goes beyond a mere survey of the eye, and implies such tests as are necessary to ascertain the quality of the thing inspected, whatever it may be; and we have no doubt that the jury in this case understood that a reasonable inspection meant a reasonable examination,—such an examination as was necessary to determine the quality of the pipe. Possibly a better word might have been used by the court in its instructions to the jury, but cases will not be reversed on account of mere choice of expressions or words used by the court in its instructions to the jury.

The second instruction complained of was as to measure of

damages. The court instructed the jury that the measure of damages was the difference between what the glass broken was worth immediately before the same was broken and what it was worth immediately after it was broken. The complaint in this case alleges that plaintiff was damaged by the defendant by reason of its "breaking in and destroying glass in the doors and windows of said building, of great value, to wit, of the value of two hundred sixty-six and thirty-hundredths dollars (\$266.30), to the damage and injury of said estate of L. M. Starr, deceased, in the sum of two hundred sixty-six and thirty-hundredths dollars (\$266.30)." It is insisted by the appellant that the rule of damages should not be varied to meet the requirements of pleadings, but that it should be stated generally, and that the lower court should have instructed the jury that the measure of damages should include not only the value of the glass, but the expense of replacing the glass; in other words, that the amount of the recovery would be such an amount as would put the premises in as good condition as they were in before the accident. We think, however, that no element of damages could be awarded to the plaintiff that it did not claim in its complaint,—that the judgment could not be greater than the demand,—but outside of this, we think the instruction was substantially correct, and was not in conflict with the ruling of this court in *Koch v. Investment Co.*, 9 Wash. 405, 37 Pac. Rep. 703.

Judgment affirmed.

Opinion by DUNBAR, J.

SMITH v. CITY OF SPOKANE.

Supreme Court, Washington, February, 1897.

INJURED ON SIDEWALK.—Where plaintiff was injured by slipping on an icy sidewalk the question whether, knowing of the existence of the ice, she was negligent, was for the jury.

PERSONAL EXAMINATION.—Where a request was made for personal examination of plaintiff by physicians to be selected by defendant alone, that was sufficient ground for refusing the request.

DAMAGES.—The sum of \$10,500 awarded to a woman thirty-eight years of age, capable of earning \$75 per month, for injuries to leg and internal injuries, not excessive.

FROM a judgment for plaintiff rendered in the Superior Court, Spokane County, defendant appeals.

W. H. PLUMMER, for appellant.

L. H. PLATTOR and FENTON & SAUNDERS, for respondent.

About seven o'clock on the evening of February 2, 1895, while the plaintiff and respondent were walking south on the east side of Stevens street, between Sprague street and First street, in the city of Spokane, she slipped and fell upon the ice which had accumulated upon the sidewalk, and broke the smaller bone of one of her legs, near the ankle, and also received internal injuries of a serious nature. Subsequently she brought this action against the city to recover damages for the injuries thus sustained; alleging, in effect, in her complaint, that the city was negligent in not keeping the sidewalk in a reasonably safe condition, and that such negligence was the sole cause of her injury. As an affirmative defense, the city alleged that the injury received by plaintiff, if any, was caused wholly by her own negligence and want of proper care. Upon this issue the cause proceeded to trial, and at the close of plaintiff's evidence the defendant moved for a nonsuit, and at the conclusion of all the testimony in the case the defendant moved for a peremptory instruction to the jury to return a verdict for the defendant. These motions were based upon the alleged ground that the undisputed evidence showed that plaintiff's injuries were caused by her contributory negligence. Both of these motions were denied, and this ruling of the court is one of the principal errors relied upon for a reversal of the judgment. It is conceded that it was the duty of appellant to keep its sidewalks free from obstructions and defects, and in a reasonably safe condition for travel, and it is not seriously contended that it discharged its duty in that regard. The evidence clearly shows that at the place where plaintiff fell and was injured, and which was in the business portion of the city, the sidewalk was covered with ice and snow to the depth of from four to eight inches, and had been so covered for a month prior to the time when plaintiff fell upon it, and that the city had not attempted to remove the ice and snow from the walk, or to take any steps whatever to render it safe for pedestrians, although its street commissioner had been personally notified of the condition of the sidewalk at this particular point some days before the accident, by an individual who had himself fallen on the ice at the same place where the plaintiff fell. The testimony clearly shows that the sidewalk where the plaintiff was injured was several inches lower than the vacant lot adjoining; that during the preceding month of January the snow had melted at various times, and run down off the vacant lot upon and across the sidewalk, thus causing an accumulation of ice and snow thereon, which, by alternate freezing and thawing, and the passing of pedestrians and the crossing of wagons, had become rough, uneven, and

rounded up to such an extent that it was dangerous for persons to pass over it. This snow and ice, in the condition in which it then was, clearly constituted an obstruction to travel, which it was the duty of the city to remove, and which rendered it liable in damages to any one injured thereby while in the exercise of ordinary care and prudence. *Calder v. City of Walla Walla*, 6 Wash. 377, 33 Pac. 1054. It appears from the testimony of the plaintiff that at the time the accident happened she was going to the Hotel Spokane, situated on the corner of Stevens and First streets, with a view of attending a reception to be given there; that she was not walking rapidly; and was careful how she walked,—as careful as any person would ordinarily be when walking along the street; that she had safely passed over this sidewalk in the daytime five or six times during the three preceding weeks,—the last time about a week before the accident; and that the ice and snow upon the sidewalk at the time she was injured seemed to be in about the same condition, so far as she was able to observe, as it was when she saw it the week before, and at other times. It is not clear from her testimony that the plaintiff noticed the real condition of this particular part of the sidewalk before she stepped upon it, but she does say that she observed its condition after she fell, and especially after she was assisted into a sleigh which was standing close to the edge of the sidewalk at the time. There was an electric arc light at the Sprague street crossing, and another about a block away, which afforded sufficient light for the plaintiff to see the condition of the street with more or less distinctness. Upon this state of facts, did the court err in denying the defendant's motions? In other words, would the trial court have been justified in saying, as matter of law, as it was in effect requested, that the plaintiff was guilty of contributory negligence and therefore not entitled to recover in this action? We think this question must be answered in the negative. The question of negligence on the part of the defendant, or of contributory negligence on the part of the plaintiff, is ordinarily a question of fact, to be determined by the jury from all the facts and circumstances in evidence. It is not shown by the record why the court refused to make the order for examination of plaintiff, but the fact that the request was for an examination by physicians selected by appellant alone was a sufficient ground for refusing it.

The jury returned a verdict in this case in favor of the plaintiff for \$10,500, and it is earnestly insisted on behalf of the defendant that it is so excessive that a new trial ought to be awarded on that ground alone. The undisputed testimony of Dr. Webb is to the effect that the injury of the respondent's leg is permanent, and will

probably result in amputation; that the internal injury is also permanent and painful. And respondent herself testified that she was thirty-eight years of age, and that prior to this injury she was, in every respect, a strong and healthy woman; that she had previously been employed as a teacher, and as such had earned \$75 per month, but was wholly incapacitated from following her previous vocation, by reason of her injuries; and that from the time of the accident up to the time of the trial, a period of some eight months, she had scarcely been free from pain. We perceive nothing indicating that the jury, in assessing the damages, was influenced by prejudice or passion, and it is only in such cases that the court is authorized by the statute to set aside a verdict on the ground of excessive damages.

Judgment affirmed.

Opinion by ANDERS, J.

BROWN ET UX. V. SEATTLE CITY RAILWAY COMPANY.

Supreme Court, Washington, February, 1897.

ALIGHTING FROM MOVING CABLE CAR.—Whether it is negligent in a person to alight from a moving car is a question for the jury to determine from the facts.

APPEAL from judgment rendered for plaintiffs in the Superior Court, King County.

ANDREW F. BURLEIGH and THOS. A. GAMBLE, for appellants
J. T. RONALD, for respondents.

The appellant company is the owner of a cable railway in Seattle. The eastern terminus of the road is situated on the shore of Lake Washington, at the foot of Yesler Way, and its western terminus is also on Yesler Way, at the junction of that street with Occidental avenue. At the western terminus of the road is a turntable on which the trains of the railway are run and turned around preparatory to starting on their trip eastward to Lake Washington. On September 22, 1893, between five and six o'clock in the afternoon, a train of the appellant company, consisting of a dummy and a trailer car, arrived at the turntable at the western terminus of the road, and was turned around, and coupled together in the usual manner. The train had not yet started on its trip to the lake, when the respondent, Mrs. Brown, entered the car, where there were three or four passengers seated. She took her seat on the south side of the car,

near the front door. Just as she was seated, her husband, one of the respondents, followed her, and called out to her, asking if she had "got the medicine for the old lady." Mrs. Brown replied that she had forgotten it, and, getting up, went hastily out of the car to the front platform, and stepped off the car, and, while stepping off, was thrown down, and sustained severe injuries.

The second point made by appellants upon the insufficiency of the evidence to support the verdict is that the plaintiff did not show that the car was not in motion when Mrs. Brown attempted to alight. There is certainly substantial conflict in the evidence that went to the jury on this point, and we cannot announce as a legal proposition that a passenger upon a street railway car may not get off the car when in motion. It would depend entirely, in our judgment, upon the circumstances,—that is, the rate of speed, place at which the passenger might attempt to alight, and other things,—which would make each case depend upon the particular facts, and necessarily, ordinarily, be a question of fact for the jury to determine whether the act of the passenger was negligent.

Judgment affirmed.

Opinion by REAVIS, J.

HINKLEY v. TOWN OF ROSENDALE.

Supreme Court, Wisconsin, February, 1897.

INJURED WHILE DRIVING—STUMP OF TREE.—It is a question for the jury whether a township is liable for the presence of a tree stump on a highway, which was alleged to have caused injury to a person while driving.

APPEAL by plaintiff from judgment rendered for defendant in the Circuit Court, Fond du Lac County.

GARY & FORWARD and C. D. MCFARLAND, for appellant.

MAURICE MCKENNA and E. S. BRAGG, for respondent.

Action for recovery of damages for injuries received upon one of defendant's highways. At the place of the accident the road was sixty-six feet wide. There were three tracks over which the travel went. One, near the center of the highway, had been worked by hauling gravel upon it. The westerly track was one where teams had gone, to avoid the greater dust, over the turf. No work had been done upon it. At this point the ground was level and smooth. On the west side of this westerly track, and twenty inches to two feet from it, and eight and one-half feet from the center of the highway, was an old stump, a foot to eighteen inches high. It had been

there for eighteen years. The plaintiff lived upon this highway, about eighty rods from the place of the accident. She traveled frequently over this highway, and knew of the presence of the stump. She was driving on a dark night, forgetful of the stump, when the wheel of her cart struck the stump and upset the vehicle, and the plaintiff's arm was broken. At the trial, there was a verdict and judgment for the defendant. The case lacks novelty. The facts are few and simple, and easy of comprehension. The legal principles which govern are so well settled by repeated adjudications of this court as to be elementary and familiar. The trial court could not well err, unless through excess of painstaking. The fundamental question was whether the presence of the stump in that place was such negligence as made the town liable for the plaintiff's accident. This question, under familiar principles, was for the jury. The plaintiff asked that it be taken from the jury, by the instructions asked, to the effect that the presence of the stump was negligence, and that, if the plaintiff was herself without negligence, she is entitled to recover. These proposed instructions the court rightly refused to give. On the contrary, it submitted the question of the defendant's negligence to the jury, with appropriate and accurate instructions.

Judgment affirmed.

Opinion by NEWMAN, J.

WOLTERS ET AL. V. WESTERN ASSURANCE COMPANY.

Supreme Court, Wisconsin, February, 1897.

PROPERTY DESTROYED BY FIRE — BURDEN OF PROOF.— In an action to recover upon a policy of insurance the burden of proof is upon defendant to show that the loss of personal property was due to the plaintiff's neglect or misconduct in not using all reasonable means to protect it at and after a fire.

APPEAL from judgment rendered for plaintiffs in the Circuit Court, Manitowoc County.

QUARLES, SPENCE & QUARLES, for appellant.

G. G. & C. H. SEDGWICK and TIMLIN & GLICKSMAN, for respondents.

Action brought upon a policy of fire insurance for \$2,000,—\$1,500 on a frame building and saloon at Two Rivers, Wis.; \$100 on saloon

furniture; \$100 on wines and liquors; and \$300 on household and kitchen furniture, beds, bedding, family stores, etc. One Grotegut was joined as plaintiff, by reason of his mortgage interest in the real estate, amounting to \$1,200. The complaint charged the total destruction of the building by fire November 28, 1894, and claimed \$481.64 by reason of loss on household furniture, beds, bedding, wearing apparel, etc., and alleged a loss of \$285.50 on the stock of wines, cigars, etc. The fire and partial destruction of the personal property were admitted by the answer, but all liability under the policy was denied, 1, because it was alleged that the fire was set by the plaintiff Wolters, or by his procurement; 2, because Wolters, by his conduct at the time of the fire, actively interfered to prevent salvage by neighbors and friends who were present, and that his conduct in that respect was fraudulent, whereby he forfeited any right to recover damages for personal property under the policy. The jury found for the plaintiffs, and assessed their damages at \$1,963,—that is to say, \$463 over and above the insurance on the building; it appearing that the building was totally destroyed, within the meaning of the law. The undisputed evidence shows the value of the household and kitchen furniture, utensils, and effects covered by the policy was in excess of \$500, and the damage to them by reason of the fire was \$481.64; that the value of the saloon furniture and fixtures before the fire was \$294.50, and the loss or damage by reason of the fire, \$285.50. So that the loss was far in excess of the amount of the insurance. Evidence was given of facts and circumstances tending to show that the fire was incendiary in its origin, and also to show that the plaintiff Wolters absented himself from the fire about twenty-five minutes or half an hour, and tending to show that he made no effort to save anything. There was sufficient testimony to require that the question whether Wolters not only made an effort to save anything, but also whether he actively interfered to prevent friends and neighbors from making any salvage, be submitted to the jury. The plaintiffs had judgment on the verdict, and the defendant appealed.

The instructions to the jury on the subject whether the loss was caused, directly or indirectly, by the neglect of the plaintiff Wolters to use all reasonable means to save and preserve the property at and after the fire, and also as to the effect of such negligence on the plaintiff's right of recovery, as well as the fact, if they so found it, that the plaintiff Wolters prevented or obstructed the saving of the personal property, are correct. It was submitted to the jury to find what was the value of the insured property lost in consequence of such conduct on his part, if any, and they were told that the defendant

would not be liable for the value of the property lost by reason of such neglect or improper interference. It is not claimed that there was any stipulation or condition in the policy by which it would be avoided for such neglect or misconduct. The law does not favor forfeitures, and a forfeiture of the policy cannot be raised, on these grounds, by implication. The most that can be said is that the company would not be liable for any loss caused by the negligence or misconduct of the insured, and, if no loss was so caused, the defendant was not injured thereby, and had no ground of defense by reason of the alleged neglect or misconduct. *Commercial Bank of Milwaukee v. Firemen's Ins. Co.*, 87 Wis. 297, 58 N. W. Rep. 391. The instruction asked by the defendant's counsel is faulty, and was properly refused. Instead of resting its partial defense, for destruction of the personal property, on the legitimate result of the negligence or misconduct of Wolters, such partial defense was to be made available to the defendant, by this instruction, not upon the ground that such negligence or misconduct was the proximate cause of the loss, but in the event that the evidence failed to show that reasonable efforts to save such property would have been unsuccessful, making the partial defense to finally depend, not upon what the evidence showed, but upon what it failed to show. The burden of proof was on the defendant to show that the loss was caused by Wolters' neglect, or misconduct. *Freeman v. Insurance Co.*, 144 Mass. 572, 12 N. E. Rep. 372; *Cronkhite v. Insurance Co.*, 75 Wis. 116, 43 N. W. Rep. 731; *Insurance Co. v. Johnson*, 46 Ind. 315, 326.

Judgment affirmed.

Opinion by PINNEY, J.

SLENSBY v. MILWAUKEE STREET RAILWAY COMPANY.

Supreme Court, Wisconsin, February, 1897.

CHILD RUN OVER BY ELECTRIC CAR—PROXIMATE CAUSE.—Where a young child was run over by an electric car, the jury were not bound to accept the motorman's evidence as to when he first saw the child, regardless of the other evidence offered, and a finding that the failure to use proper care when the motorman did see the child, was the proximate cause of the injury, was supported by the evidence.

APPEAL from judgment rendered for plaintiff in the Superior Court, Milwaukee County.

MILLER, NOYES, MILLER & WAHL, for appellant.

TOOHEY, GILMORE & DONOVAN and J. V. QUARLES, for respondent.

Action to recover damages for being run over by a street car of the defendant. The complaint is in the usual form in such cases. The answer consists of admissions and denials. At the close of the trial, the jury returned a special verdict in favor of the plaintiff, and, from the judgment entered thereon, the defendant brings this appeal.

There is undisputed evidence to the effect that, at the time mentioned, Orchard street, in Milwaukee, ran east and west, and was about sixty-five feet wide, including sidewalks; that Clinton street ran north and south, and crossed Orchard street at right angles; that immediately south of Orchard street, and west of Clinton street, there was a store having a front on Clinton street of about sixteen feet, and running back on the line of Orchard street a distance of forty-nine feet; that south of that store, and about three feet from it, was a double house, having a front on Clinton street, and flushed with it of about thirty feet, and running back thirty-six feet; that between that double house and the store mentioned was a passageway about three feet wide, kept closed by a gate; that immediately south of the double house, and between it and a cottage, was a narrow passageway, kept closed by a gate; that the parents of the plaintiff, at the time in question, lived in the south half of the double house, and their children were in the habit of playing in the back yard, which was usually kept closed by gates; that Clinton street was seventy-six feet wide, including sidewalks, and fifty-two feet wide between the sidewalks; that on the east side of Clinton street, and one hundred and twenty-five feet south of the south line of Orchard street, there was a grocery store; that the north line of that store was about seventy-five feet south of the south line of the double house projected; that the defendant's street-car line was located on Clinton street, having double tracks thereon; that the sidewalk on each side of that street was twelve feet wide; that between each sidewalk and the nearest rail was about seventeen or eighteen feet; that each railway track was less than five feet wide, and that the distance between the two tracks was about five feet; that between the two tracks and about fifty feet south of Orchard street was a trolley post, the same being in line with the south line of the double house projected; that about ten or eleven o'clock on the forenoon of July 11, 1894, the plaintiff, who was at that time about thirty-one months of age, and still wore dresses, had escaped from his home, in some way not accounted for, and was seen at the front of the grocery store on the east side of Clinton street,

mentioned, in the act of climbing down from the sidewalk into the street; that just then a team drawing a coal wagon, with three tons of coal thereon, came from the south on the east side of the east track; that at first the little boy, "Leo," as he was called, started to cross the street, and go towards his home, in front of the coal team, but suddenly stopped, and then proceeded to cross from behind the coal wagon, and continued to go in the direction of his home until he reached the west car track, when he was struck by a car running south on that track, at a point about sixty-six feet south of Orchard street, and about seventeen feet south of the trolley post, and about seventy feet from the northwest corner of the grocery store where he was first so seen.

The special verdict is to the effect that the mother of Leo exercised ordinary care and prudence in taking care of him, and prevented him from going on the street upon which he was injured; that it was dangerous for a child of his age to go unattended upon and across the street, with cars passing and repassing; that the motorman, by the exercise of ordinary care, ought to have seen Leo in time to have avoided the accident; that the failure of such motorman to see him in time to have avoided the accident was not the proximate cause of the injury; that the motorman, after he saw Leo, did not use such means to prevent the injury as a motorman of ordinary care and prudence would have used under the same circumstances; that such omission on the part of the motorman was the proximate cause of the injury; that the brake of the car in question was not out of repair at the time of the accident to such an extent that the car could not be stopped by a motorman in the exercise of ordinary care and prudence within the usual and ordinary time and distance; that the defendant was guilty of a want of ordinary care, which was the proximate cause of the injury; that they assessed the plaintiff's damages at \$11,000. The motorman testified, among other things, to the effect that his motors were good; that, when he was north of Orchard street crossing, he saw some children playing in the gutter, and on the sidewalk, on the west side, and that he then was going at about six miles an hour, and immediately cut off the power, and let the car drift; that he passed the coal wagon just about at the trolley post; that he noticed a little girl on the west side, motioning with her hands; that he glanced to the east, and saw Leo on the rail, going under the car; that he immediately set his brake, but did not reverse his motor, because Leo had dresses on, and that, if he got caught in the gear, he would have been mangled, and in going at that speed there was a chance for stripping the gear. The driver of the coal wagon, among other things, testified to the effect that he

heard the alarm as the car was passing him, and that he looked around, and that Leo was eighteen or twenty feet from the car; that he then stopped the wagon, so that the front feet of his horses stood on the south corner of Orchard street; that his team and wagon were about twenty-six feet in length. According to his testimony, his wagon must have gone a distance of nearly one hundred feet while Leo went from the rear of the wagon to the point where he was struck by the car. The team and wagon moved north on a line some fifteen or twenty feet east of the east rail of the track on which the car was moving south, and within that space the vision of the motorman was necessarily unobstructed, except by the trolley post, and that such space necessarily broadened as the wagon moved north, and the car moved south. The testimony of ladies on the car tended to prove that, at or before crossing Orchard street, they saw Leo when passing from the sidewalk to the street in front of the grocery store, and they afterwards saw him in the street, after he passed from behind the wagon, and between the east track and the east curb of the street. There is plenty of evidence to support the finding that the motorman ought to have seen Leo in time to have avoided the accident, but they found that his failure to see him earlier was not the proximate cause of the injury. They failed to find just where Leo was with respect to the car when the motorman first saw him; but they do find that, after he did see him, he failed to exercise ordinary care to prevent the injury, and that such failure was the proximate cause of the injury. This finding is, as we think, supported by the evidence. There is evidence tending to prove that Leo was about fourteen feet from the car when the little girl motioned to the motorman as he testified. Certainly, the jury were not bound to accept the motorman's statement as to just where Leo was when he first saw him, regardless of the other evidence and circumstances in the case. *Jambor v. State*, 75 Wis. 669, 44 N. W. Rep. 963.

Judgment affirmed.

Opinion by CASSODAY, C. J.

LORD v. CITY OF MOBILE.

Supreme Court, Alabama, February, 1897.

PLEADING.—An averment that the defendant negligently allowed a dangerous hole to remain in one of its sidewalks, imports that the defect had existed sufficiently long to have been discovered and remedied by the exercise of due care on the part of the city.

MUNICIPAL CORPORATION — SIDEWALK — REVENUE OF CITY.—

Where a special duty is enjoined on a city by its charter to keep its sidewalks in repair, it is answerable in damages to any one who suffers injury from the negligent performance of that duty, and it is no defense merely to allege that it had exhausted its means to repair sidewalks, and no attempt was made to show that it had exhausted all its powers as conferred by the charter to raise revenue.

INJURED BY STEPPING IN HOLE IN SIDEWALK.— Where it was shown that the plaintiff stepped into a hole in a sidewalk in the night-time, that he did not know of the existence of the hole which had been there sufficiently long to have been discovered and remedied by the city, that it did not appear that defendant was powerless to make the repair, the plaintiff should have been given the general charge

APPEAL from Circuit Court, Mobile County.

GEORGE L. & H. T. SMITH, for appellant.

PETER J. HAMILTON, for appellee.

This was an action for injuries alleged to have been sustained by plaintiff stepping into a hole in the sidewalk. The court, against the objections of the plaintiff, allowed witnesses to testify that the plaintiff was a white man, and was married to a negress, and that he was compelled to leave Texas, where he had been teaching school, because of his immorality. Mr. Rich was mayor of the city and Mr. Fry was chairman of the finance committee. There was a verdict for defendant, and plaintiff appeals from the judgment entered thereon, and assigns the rulings of the court as error.

The averment that the defendant negligently allowed a dangerous hole to remain in one of its sidewalks, imports that the defect had existed sufficiently long to have been discovered and remedied by the exercise of due care on the part of the defendant. The allegation of the defect, and of notice of its existence, was sufficient. The question of negligence, where the facts are disputed, is always for the jury. *City Council v. Wright*, 72 Ala. 411; *Railroad Co. v. Hawkins*, 92 Ala. 241, 9 So. 271. The courts take judicial knowledge of the charter, and where a special duty is enjoined on the city by its charter, to keep its sidewalks in repair, it is answerable

in damages to any one who suffers injury from the negligent performance of this duty. *City Council v. Wright, supra.* It was no defense that the city had no means at its disposal for the care of the streets.

All the questions the court allowed against the objection of plaintiff as to his color, the color of his wife, and her mother should have been excluded. The matters inquired about had nothing to do with the case, and the only effect of such evidence was to unduly prejudice the jury against the plaintiff.

Evidence of the amount of money paid to repair streets proper for the purpose of showing that the city had exhausted its means to repair the sidewalks, was irrelevant. There was no offer by defendant to show that it had exhausted all its powers as conferred by charter to raise revenue, and that all its resources to this end had been exhausted with no fault on its part in doing what the charter enjoined as a duty. The evidence of Mr. Rich and Mr. Fry, concerning the amount of money received and expended by the city for various purposes, was not admissible. The object of the evidence was to show that the city required the property owners to keep up their sidewalks. This constituted no excuse for the city to disregard its charter obligation, a duty it could not shirk, and claim immunity for its negligence by requiring some one else to perform it for them. The streets and sidewalks are for the benefit of all conditions of people.

The plaintiff testified that he stepped into the hole in the sidewalk at the corner of Scott and St. Francis streets, in Mobile, about half-past nine at night; that the hole was at the end of one of the planks constituting a bridge across the gutter on St. Francis street, and was large enough for his foot to enter; was about fifteen inches deep and so small at the bottom that his foot was wedged in it. There is no evidence in conflict with plaintiff's statements as to when and where and how the accident occurred. Since this is all the evidence tending to show contributory negligence on plaintiff's part, the defense as to that plea is without merit, and offered no objection to the general charge. It was shown by a witness, a letter carrier, that he frequently passed the point at which plaintiff was hurt, and for a month or so before the accident occurred, he noticed the hole, which looked like it came from the dripping of a pipe.

We hold that on the undisputed facts the defect existed for such length of time as that, by the exercise of due care on the part of the defendant, it might have been discovered and remedied.

Reversed.

Opinion by HARALSON, J.

HAIZLIP v. ROSENBERG.

Supreme Court, Arkansas, February, 1897.

LANDLORD AND TENANT — DAMAGE TO TENANT OF LOWER STORY BY OVERFLOW OF WATER IN UPPER STORY. — In the absence of a statute or a covenant to repair, a landlord who lets a building to two tenants is not liable to the one occupying the lower part for damages resulting from an overflow of water from a closet in the upper part that is in the exclusive control of that tenant, when the water fixtures were in good condition at the time of letting.

APPEAL from judgment, Circuit Court, Jefferson County, in favor of defendant on counterclaim in action by plaintiff for rent.

N. T. WHITE, for appellant.

This was an action to recover rent of a storehouse in Pine Bluff, in which the appellees set up a counterclaim for damages caused, as they allege, through the negligence of the appellant in permitting defective water fixtures to remain in an unoccupied closet, situated above the storeroom rented by the appellees, whereby the water ran down upon appellee's goods and damaged them. It was shown at the trial that the upper and lower stories had been rented to separate tenants — the upper story to a cotton buyer, and the lower to appellees; that there was a water-closet in the upper story for the use of the tenant occupying that story, and one in the yard for the use of appellees. That the water supply for the building was through a main pipe that went through the closet in the yard, through the store and up into the water-closet upstairs. The evidence tended to show that the water-closet tank appurtenances that should have controlled the pressure of the water were out of repair. The tenant of the upper story had exclusive control of that story. The building upstairs and down was in first class condition at the time it was rented. No fault about the construction of the water fixtures in the water-closet. There was no contract with the tenants that appellant was to keep the water fixtures in repair, and no actual notice was given to nor did appellant know that the water fixtures were in bad repair before or at the time of the overflow. The appellees recovered a judgment.

In the absence of a statute or a covenant to repair, a landlord who rents the upper story of his building, containing a water-closet, with water fixtures properly constructed and in good condition at the time of the lease, and who gives to the tenant the exclusive possession and control thereof, is not liable to a tenant of the lower story

for damages caused by some defect in the water fixtures of said water-closet accruing during the term of said lease. The court erred in its charge. 2 Wood, L. & T., sec. 381, note; *Friedenberg v. Jones*, 66 Ga. 505; *Gocio v. Day*, 51 Ark. 46, 9 S. W. 433; *McCarthy v. Bank*, 74 Maine, 315; *Ditchett v. Railroad Co.*, 67 N. Y. 425.

Reversed.

Opinion by Wood, J.

ST. LOUIS, IRON MOUNTAIN AND SOUTHERN RAILWAY COMPANY v. FORBES.

Supreme Court, Arkansas, February, 1897.

INJURED WHILE COMING OUT OF FREIGHT HOUSE.—Where a man seventy-seven years of age went to a freight house, to enter which he pulled himself up from the platform that was twenty-two inches lower than the doorway, and without a step, and in coming out of such house, carrying a box in front of him, he fell, by reason of the absence of such a step, he was guilty of contributory negligence.

APPEAL from judgment, Circuit Court, Lonoke County, in favor of plaintiff.

DODGE & JOHNSON, for appellant.

T. E. HENDRICKS and WILLIAMS & BRADSHAW, for appellee.

J. C. Forbes instituted an action against the St. Louis, Iron Mountain & Southern Railway Company for the recovery of damages occasioned by a fall received by him in stepping from the defendant's freight house onto a platform. He recovered a judgment for \$1,000, and the defendant appealed.

The strongest evidence in favor of appellee, upon which the judgment could have been based, was his own testimony. He testified in behalf of himself substantially as follows: He was seventy-seven years old; on the 24th of March, 1894, he went to Austin, in this State, to get a box of strawberry plants which had been sent to him by express. He went into the office of the agent of the express company to pay the charges against the same, and learned they were \$1.95. He handed the agent \$2.00, and the agent, after going to a safe, left the office, and appellee, thinking he was going to get the box of strawberry plants, followed. The agent went across the railroad, and as he did so, said to appellee, "Parson, you will find your box in there," pointing to the room of the freight house of appellant. Appellee entered the house at the open door, which was

proved to be six or eight feet wide, and about twenty-two inches higher than the platform in front of it. In entering he caught hold of the side of the door and pulled himself up into the freight house. He said he had to pull himself up because there was no step there. It was proved that there was no step there. He testified that when he entered he got his box and started to go out the back door, and finding it closed, turned to the door through which he had just entered, and, carrying the box before him, stepped out onto the platform, and, as he did so, fell, the box falling on him, and he received the injury of which he complains.

According to his own statement, if it be conceded that the appellant was guilty of negligence in failing to provide steps to the door, he was guilty of contributory negligence, and is not entitled to recover.

The judgment of the Circuit Court is reversed, and final judgment will be rendered in favor of appellant.

Opinion by BATTLE, J

BROGAN v. BROGAN.

Supreme Court, Arkansas, January, 1897.

JURISDICTION OF PROBATE COURT AS TO REAL ESTATE. — Where there are claims outstanding against an estate which has realty undisposed of, the probate court has jurisdiction to decide on an application for a final settlement by the administrator whether the creditors have lost by laches the subjection of the property to their claims.

LACHES. — A delay of twenty-one years by the creditors to subject the lands of an intestate to the payment of debts is not excused by the fact that the property was in litigation for six years or that the administrator was waiting for an advance in the price of land.

SAME. — A wait of three years by an administrator, after final judgment, to see if an appeal would be taken from the judgment, is a good excuse for not sooner proceeding to subject the property that was in litigation to the payment of his intestate's debts.

APPEAL from Circuit Court, Sebastian County.

THOMAS BOLES, for appellants.

JOSEPH M. HILL and PRESTON C. WEST, for creditors.

GRACE & FORRESTER, for administrator.

Joseph Brogan, a resident of Sebastian county, died in 1873, leaving real and personal property, of which estate his brother, E. C. Brogan, was appointed administrator in November, 1873. The assets of the estate are exhausted with the exception of a lot in the

city of Fort Smith, and a farm in Sebastian county, but there are still debts of the estate unpaid. This proceeding was brought October 10, 1894, in the Probate Court, that the administrator held possession of unsold real estate, and as the right to subject such real estate to pay debts had been barred by laches, the court compel him to file an account and enable the heirs to take possession of the real estate. The Probate Court found that the right to subject the town lot had been barred by laches, but not so with the farm tract. On appeal, the Circuit Court found that the rights of creditors were not barred as to either tract. The creditors were allowed to become parties to the proceeding.

Probate courts have no jurisdiction to determine questions of title to real estate arising under claims of title adverse to the estate. But when, in order to determine whether the administration should be closed, it becomes necessary incidentally to inquire and decide whether the creditors have lost the power to subject the real estate of the intestate to the payment of their debts, the Probate Court has power to determine that question. *Tryon v. Farrisworth*, 30 Wis. 577; *McWillie v. Van Vacter*, 35 Miss. 428.

Twenty-one years had expired after the grant of letters of administration before the commencement of this proceeding in the Probate Court. This would defeat the lien of the creditors unless there be something to excuse the delay, for it has been decided that more than seven years is not reasonable. *Roth v. Holland*, 56 Ark. 633, 20 S. W. 521. The excuse given here is that the title to the land was involved in litigation. The town lot was sold by the administrator in 1876, but the sale was set aside in the same year, and he did not again offer it for sale. In 1882 a suit was begun against the administrator to recover this lot, and was terminated in 1885 by a judgment in favor of the administrator. If three years be added to the time, being the time allowed for an appeal, there still remain fifteen years of the twenty-one when no such impediment existed. As a further excuse the administrator says that real property was very low and he was waiting for an advance. While an administrator should endeavor to sell land of his intestate at a fair price, he has no right to withhold it from sale for long periods waiting for an advance in prices. No sufficient excuse is shown. The administrator cannot take advantage of his own laches, and as he is one of the heirs, his interest in the lot is still subject to the debt of the estate. As to the farm tract that has been involved in a law suit that was not settled until 1890, and as the adverse litigants had three years in which to take an appeal, the administrator, under advice of his attorney, waited until the expiration of that time before offering

the lands for sale. Soon afterwards this proceeding was commenced. We think the court did not abuse its discretion in holding that the excuse given for the delay was reasonable, and that the right of the creditors to subject this tract of land to their debt is not barred.

The judgment of the Circuit Court to be modified accordingly, and, as modified, affirmed.

Opinion by RIDDICK, J.

HARRISON v. SUTTER STREET RAILWAY COMPANY ET AL.

Supreme Court, California, March, 1897.

EXCESSIVE VERDICT.—Whether a verdict is excessive is to be determined solely from a consideration of the evidence in the case.

SETTING ASIDE VERDICT.—A verdict for \$8,000 for a death set aside by the trial court as excessive was not an abuse of discretion where the evidence showed that the deceased was sixty-nine years old, earning on an average \$110 a month, that the probability of his life was a little over nine years, and that his utmost gross earnings for that period, without interruption from sickness or other cause and with a rate of earning in no way diminished, would amount to only \$12,000.

EVIDENCE.—It was error to exclude evidence of an ordinance introduced to show negligence of a car in stopping at the middle intersection of streets, whereby a wagon collided with the car, when the ordinance prohibited such stopping.

EVIDENCE—PRIVILEGED COMMUNICATION.—Evidence of what was disclosed by an autopsy on the body of one for whose death an action is brought is not privileged under subd. 4 of section 1881, Code of Civil Pro.

SAME.—Under the same section, after the death of the patient, his legal representatives cannot waive the objection which the statute gives.

APPEAL from order of Superior Court, City and County of San Francisco, granting new trial.

WILLIAM H. JORDAN, for appellant.

NAPHTALY, FREIDENRICH & ACKERMAN, MARCUS ROSENTHAL and DUNNE & MCPIKE, for respondents.

The plaintiff had verdict and judgment against defendants for \$8,000, as damages suffered by the heirs of his intestate through the death of the latter, resulting from injuries received in a collision between a car of the railroad company, on which he was a passenger, and a wagon of the brewing company, occasioned by the negligence of the defendants. The court below granted defendants a

new trial on the ground that the verdict was excessive, and the plaintiff appeals from such order, urging that it was wholly unwarranted under the evidence, and was an abuse of discretion on the part of the court. Whether the verdict is excessive is to be determined solely from a consideration of the evidence in the case, and whether it will fairly sustain the conclusion of the jury — a question which cannot be aided by the showing of extrinsic facts by affidavit or otherwise. The evidence tended to show that deceased was about sixty-nine years of age, but his physical appearance would seem to have indicated more advanced years. Two physicians testified that he appeared to be seventy-five or eighty years of age, and one of them that he was a debilitated man. His widow testified that his health was very good. His income was about \$110 per month on an average, as his business was that of an expert accountant, and he was not always employed. According to the Carlisle Mortality Tables, he had an expectancy or probable lease of life of a fraction over nine years and a half. He had dependent on him a wife and an adult unmarried daughter. Upon these facts the jury were instructed, as to the question of damages, in effect, that they should estimate and determine the amount that the deceased would, in all reasonable probability, have earned in the years yet remaining to him; and, deducting from this the amount which he would reasonably require for his own personal use and maintenance, give a verdict which would pecuniarily compensate the heirs. It is conceded that this instruction gave the correct rule for the guidance of the jury. We think that we would not be justified in holding that there was an abuse of discretion in setting aside the verdict. The jury would seem to have proceeded upon the theory that the deceased's expectancy of life would be fully realized, and that he would continue to the end with the same earning capacity as that possessed by him at the time of his death, for their verdict implies that he would have earned over and above the amount required for his personal needs the large net sum of \$8,000, and this would necessarily contemplate constant employment without interruption from sickness or other cause, and with a rate of earnings in no way diminished; since it will readily be perceived that according to his income, his utmost gross earnings in the given time would not have exceeded \$12,000. Such a result does not accord with ordinary human experience. Under these circumstances we do not think it should be said that the conclusion of the trial judge was without support in the evidence.

Among the grounds urged by defendants in support of their motion was that of errors of law occurring at the trial. The collision of the two vehicles occurred at a street crossing in the city of

San Francisco. The street car was stopped suddenly in its progress near the middle of the intersection and the brewery wagon, coming rapidly down a grade on the side street, collided with the car. There was evidence tending to show that had the car not stopped where and when it did the collision might have been avoided. This being the case, the defendant brewing company offered in evidence, as against its co-defendant, a municipal ordinance of said city forbidding the stopping of street cars upon any street crossing or crosswalk so as in any manner to obstruct travel thereon except where the grade of the street is such as not to admit of stopping at the further crossing. This evidence was objected to by the railway company, and excluded. The ruling was erroneous.

The court permitted a physician called by defendants to give the results of a medical examination made by him of the deceased after the accident, but excluded his testimony as to what was disclosed by his autopsical examination of the body after death upon the theory that the latter was not admissible under subd. 4 of sec. 1881, Code Civil Procedure, which provides: "A licensed physician or surgeon cannot, without the consent of his patient, be examined in a civil action as to any information acquired in attending the patient which was necessary to enable him to prescribe or act for the patient." The evidence does not fall within the inhibition of that provision. A dead man is not a "patient."

Defendants excepted to the admission of the testimony of the attending physicians of deceased to the effect that in their opinion the injuries caused his death; that opinion being based upon facts ascertained by them during such medical attendance. It is contended that this evidence was inadmissible under sec. 1881, above quoted. Under the principle announced in *Re Flint's Estate*, 100 Cal. 391, 34 Pac. 863, the evidence should have been excluded. While the precise question here presented — whether, after the death of the patient, his legal representative may waive the objection which the statute gives, in terms, to the patient alone — was not directly decided. It was fully discussed, and in the decisions of New York, the Code of which State was in effect, the same provisions were approved. The courts of New York, under this clause of the statute, have uniformly held that the patient alone can waive the privilege (1).

Order granting new trial affirmed.

Opinion by VAN FLEET, J.

(1) Citing *Westover v. Insurance* 320; *Loder v. Whelpley*, 111 N. Y. Co. 99 N. Y. 56, 1 N. E. 104; *Renihan v. Dennin*, 103 N. Y. 573, 9 N. E. 239, 18 N. E. 374. The decisions of the courts of

WEST CHICAGO STREET RAILWAY COMPANY v. PIPER.

Supreme Court, Illinois, January, 1897.

CARRIER OF PASSENGER—INJURY—ACTION.—A passenger injured by the negligence of the carrier and of another with whom he has no contractual relations may maintain an action against either, provided he was himself not negligent.

PAROL EVIDENCE.—Evidence for what a sum of money was paid at the time a stipulation dismissing the action against one of two joint tort feasons was signed, was not within the rule excluding parol evidence of the contents of a written contract.

JOINT TORT FEASORS—RELEASE.—Dismissal of a suit against one of two joint tort feasons does not operate as a release of the other.

APPEAL from Appellate Court, First District, reported 64 Ill. App. 605, affirming judgment in favor of plaintiff.

D. W. MUNN, for appellant.

HIRAM BLAISDELL and J. F. WATERS, for appellee.

Minnie D. Piper brought this action to recover for personal injuries alleged to have been sustained through the negligence of the West Chicago Street Railroad Company on May 26th, 1891. Plaintiff was riding on Madison street in a conveyance known as a "carrete" owned by the Russell Street Carrete Company, when at the corner of Madison and La Salle streets, it collided with one of the cars of the defendant, and plaintiff was injured. On the trial the jury assessed plaintiff's damages at \$1,100. Judgment was entered on the verdict, and on appeal it was affirmed in the appellate court.

Two grounds are relied upon by the West Chicago Street Railroad Company to reverse the judgment of the appellate court: First, it is claimed that the court erred in giving the plaintiff's first and second instructions; second, the court erred in its rulings on the admission of evidence. The instructions complained of in substance directed the jury, if they found from the evidence that the plaintiff was riding in the carrete at the time of such collision, and if the jury further believe from the evidence that such collision occurred by reason of the mutual negligence of the servants in charge of both

Indiana, Missouri and Michigan are to the contrary. *Morris v. Morris*, 119 Ind. 341, 21 N. E. 918; *Groll v. Tower*, 45 Mo. 249; *Thompson v. Ish*, 99 Mo. 160, 12 S. W. 510; *Fraser v. Jemison*,

42 Mich. 206, 3 N. W. 882. In *Thompson v. Ish* it is said: "The difference in the statutes may well cause the difference in the rule laid down in New York and Missouri."

the carrete and of said car, then the plaintiff may recover from either of said companies, and the plaintiff, Minnie D. Piper, would not be charged with the negligence of the persons in charge of the carrete provided the jury further believe from the evidence that the plaintiff herself was, at and before the time of such collision, in the exercise of such care and caution as an ordinarily prudent person would have exercised under the same or similar circumstances. The question presented by these instructions arose in *Railway Co. v. Shacklet*, 105 Ill. 364, where it was held that where a passenger in a company's train was injured through the negligence of the servants of that company, and of the servants of another company, with whom he had no contract, there being no negligence on his part, he might maintain an action against either company. That case is conclusive of the question raised here.

In regard to the other question, the ruling of the court on the admission of evidence, it appears that Minnie D. Piper, the plaintiff in this case, some time after receiving the injury complained of, brought an action for damages against the Russell Street Carrete Company and the West Chicago Street Railroad Company. The case was dismissed as to the railroad company, and default taken against the Carrete Company. The default was opened, the case reinstated, and then dismissed on plaintiff's motion and the Carrete Company paid \$100 to Mrs. Piper's attorney. On the trial of this case the court refused to allow a witness for defendant to state the contents of the paper signed at the time of the payment of the \$100, but allowed him to state what the money was paid for. This was proper, and, moreover, the evidence did no injury to defendant. The defendant had proved that \$100 had been paid the plaintiff and she had dismissed the suit against the Carrete Company. This did not constitute a defense to the action against the street railway company. A release to one of several joint tortfeasors is a release to all, and an accord and satisfaction with one of them is a bar to an action against the others. But, where there is a suit pending against several tortfeasors, the dismissal of the suit against one will not bar the action against the others. *City of Chicago v. Babcock*, 143 Ill. 366, 32 N. E. 271.

Affirmed.

Opinion by CRAIG, J.

CHICAGO AND EASTERN ILLINOIS RAILROAD COMPANY v. CHANCELLOR.

Supreme Court, Illinois, January, 1897.

EVIDENCE—DECLARATIONS.—Evidence of declarations by the deceased that she intended to go on the defendant's train, made an hour before departure and while she was attending to her ordinary household duties, not admissible as part of the *res gestæ*.

KILLED BY TRAIN WHILE CROSSING TRACK AT STATION.—Where it appeared that a woman had been standing on a station platform for a half hour, during which time a freight train had been switching back and forth, and that after a passenger train arrived, on the second track from the platform, she made no attempt to get on for several minutes, but as the freight train was moving on the first track and the first car was only a few feet distant from where she was standing, she started to cross the track towards the passenger train and was instantly killed by the freight train, she was guilty of contributory negligence.

APPEAL from judgment of Appellate Court, First District, affirming judgment for plaintiff. (60 Ill. App. 525.)

W. H. LYFORD, W. J. CALHOUN and J. B. MANN, for appellant.

THORNTON & CHANCELLOR, for appellee.

This action was brought by appellee, as administrator of the estate of Josephine Johnson, against appellant for damages for causing her death.

On the morning of the accident, Josephine H. Johnson, appellee's intestate, went from her home to appellant's passenger station at Kensington, about half an hour before the accident, and remained on the platform during that time. While she was there a passenger train arrived from Chicago, and after it remained a few minutes it went back to the city. Shortly after a passenger train arrived from Chicago and after a short stop, proceeded on its way south. Mrs. Johnson was on the platform, but did not take passage on a train in either direction. A freight train that had been switching back and forth made way for the south-bound train. The freight had fifteen cars behind the engine, and four freight box cars in front of it, and after the south-bound train had left, the freight conductor, who was standing on the same platform as the decedent, signaled his train to cross to the south-bound track, which it proceeded to do at the rate of about four miles an hour, pushing the four box cars ahead of the engine. There was a brakeman on top of the first box car on the south end. The decedent was looking east from where she

stood, until the box cars ahead of the engine were within twelve feet of her, when she hurriedly advanced and stepped down from the platform to the track as though to cross to a milk train that had been standing on the other track for from three to five minutes, and that was bound for Chicago. A bystander on the platform and the brakeman on top of the freight car shouted to her, but she paid no heed, and was struck by the cars and instantly killed. The accident occurred about nine o'clock in the morning of a June day that was clear and bright. There were no obstructions of any kind to have prevented her view of the approaching train.

The principal error assigned by appellant is the admission of improper evidence by the trial court. Over the objection of appellant, a witness was permitted to testify for appellee that she was at the house of Mrs. Johnson between seven and eight o'clock on the morning in question, and that Mrs. Johnson was getting ready to go to the city and that she was going on the nine o'clock train. At the time this was said she was getting her children ready for school.

The sole object of this evidence was to show that the decedent intended to become a passenger on appellant's train. This became a material fact in the case, for the reason that if Mrs. Johnson sustained the relation of a passenger at the time of the accident, then appellant was bound to exercise the highest reasonable and practicable degree of care for her safety. *Railroad Co. v. Pillsbury*, 123 Ill. 9, 14 N. E. 22; *Railroad Co. v. Arnol*, 144 Ill. 261, 33 N. E. 204 (1). If she did not sustain the relation of a passenger or intended passenger, then only ordinary care was required of appellant. The evidence above cited was practically all that was relied on by appellee to show her relation as a passenger. To controvert this it was shown that she purchased no ticket that morning, and after death those who took intimate charge of her effects found no ticket and only a few pennies in money in her purse. Also, that during the thirty minutes she had been at appellant's station, one regular passenger train had departed for Chicago, and one in the other direction. The question for consideration is whether this evidence was part of the *res gestæ*. If so, it was properly admitted; if not, it was error. In *Railway Co. v. Herrick*, 49 Ohio St. 25, 29 N. E. 1052, a witness was permitted to testify that on the morning defendant in error left his hotel he said to witness, who was a clerk, that he was going to Collins. He was injured while on his way to the train that ran to Collins, and the court said, in its opinion, that "declarations thus made are part of the act itself." In that case

1. *Chicago & Alton R. R. Co. v. Arnol*, 144 Ill. 261, is reported in 2 Am. Neg. Cas. 694.

the declaration was connected with the act of leaving the hotel. In the case at bar, at the time the declarations were made, the decedent was getting her children ready for school, and attending to her household duties. This declaration was not connected with the act of departure itself and was not admissible.

Another cause for reversal of this judgment is the contributory negligence of the decedent, and the failure of appellee to show negligence on the part of appellant. We know of nothing which appellant or its servants could have done within reason, the omission of which would charge them with negligence. The decedent, on the contrary, was guilty of such negligence as contributed to her death. The morning was clear and bright, and no objects intervened to prevent her seeing so large an object as a slowly moving and steadily approaching box car.

Judgment reversed.

Opinion by PHILLIPS, J.

ILLINOIS CENTRAL RAILROAD COMPANY v. CARTER.

Supreme Court, Illinois, January, 1897.

COMMON CARRIER—GOODS SHIPPED BEYOND LINE.—It is the duty of a common carrier, accepting goods marked for shipment to a place beyond its own line, to carry them to and deliver them at that place, and it cannot limit its liability by a mere stipulation in its bill of lading, not signed by the shipper nor assented to by him.

LIABILITY OF CARRIER BY WATER.—While the liability of a carrier by rail of goods, carried over a connecting rail line, terminates upon the safe carriage and storage of the goods at their destination, the liability does not cease, when the goods are carried by water, until notice of the arrival of the goods is given to the consignee, but such notice may be waived by the usual course of business of carriers or by the conduct of the consignee.

AGENT OF CARRIER—MISTAKE IN DELIVERY OF GOODS.—Where the consignee of goods that were in the warehouse of a connecting line of the first carrier forwarded a bill of lading to the first carrier's agent at the point of destination with instructions to deliver the goods as subsequently ordered, the agent became the agent of the consignee, and the carrier was not liable for a loss resulting from the agent's mistake in delivering the goods.

APPEAL from judgment of Appellate Court, First District, affirming judgment of Circuit Court. (62 Ill. App. 618.)

J. N. FENTRESS and C. V. GWIN, for appellant.

BAKER & GREELEY, for appellee.

On the 17th of June, 1891, appellee, doing business under the name of Carter, Dinsmore & Co., by his agent, delivered to the Illinois Central Railroad Company, at Chicago, for shipment, 1,000 boxes of goods called "Combination Sets," consisting of bottles of ink, inkstands, etc., valued at about \$1.50 each. At the time the goods were so delivered, a receipt for them, filled out by the agent of Carter, Dinsmore & Co., was presented to and signed by the railroad company, which is as follows:

Chicago, June 17, 1891.

Received from Carter, Dinsmore & Co., 275 Kenzie street, on Illinois Central Ry., the following articles, in good order, to be delivered in like good order, as addressed, without unnecessary delay:

| MARKS. | (Original.) | ARTICLES. |
|-------------------------|-------------|---------------------------|
| Carter, Dinsmore & Co., | | 1,000 boxes ink in glass. |
| St. Paul, Minn. | | Freight guaranteed. |
| (In red) | | (In red) |
| No. 28, Bx. Stain. | | Via Diamond Joe route. |

Please send bill of lading in duplicate to Carter, Dinsmore & Co., 275 Kenzie street.

On the same day a bill of lading was signed by the company, and received by the shipper through the mail a day or two later. It contained a stipulation limiting the liability of the company to losses occurring upon its own line. Carter, Dinsmore & Co. were both consignors and consignees of the goods. They were safely carried to East Dubuque, the terminus of the Illinois Central line, and there delivered to the Diamond Jo Line of Steamboats, and by it carried to St. Paul, arriving there on June 27, 1891. Upon their arrival they were stored by the steamboat line in its warehouse, to the account of the shipper. The Illinois Central had no depot, freight house, or other place for the storage of freight in St. Paul. Nine days after the arrival, the bill of lading, indorsed, "Deliver to C. S. Eaton, or to Fred H. Jackson, as per our telegraphic or written instructions, July 6, 1891. Carter, Dinsmore & Co.,"—was addressed to "R. J. Williams, Esq., Agent Ill. Cent. R. R.," and received by him in due course of mail. Williams was the only agent of the railroad company at St. Paul, and his authority was limited to soliciting freight for shipment, although the company had furnished him a letter head in which he was described as "Gen'l N. W. Agent."

On the 9th of July the shipper, by letter, directed Williams to deliver 330 of the boxes to Eaton & Jackson, which order he gave to one Brockway, agent of the Diamond Jo Line, in charge of the warehouse where they were stored, and Brockway delivered the goods, as directed, to Eaton & Jackson. On July 14th another order was sent to Williams, by telegram, directing 100 of the remaining boxes turned over to Eaton, and 100 to Jackson, and 200 to be forwarded, consigned to themselves, at places to be designated by Eaton & Jackson. This telegram was likewise turned over by Williams to Brockway, but the latter delivered the whole 400 boxes to Eaton & Jackson, which, it is claimed, they failed to account for, and this suit is to recover from the Illinois Central for the 200 boxes delivered to Eaton & Jackson, instead of being forwarded as directed. It also appears that subsequently to the sending of the telegram above mentioned, on August 4th, an order was sent to Williams, similar to the first, directing 270 of the boxes to be delivered to Eaton & Jackson, which was turned over to Brockway, and the goods delivered as therein directed. The declaration is in assumpsit, and counts upon a breach of duty on the part of the defendant, as a common carrier, for a failure to deliver the goods according to directions, to which a plea of nonassumpsit was filed; and upon issue joined the cause was tried by a jury, resulting in a verdict and judgment for the plaintiff for \$240. That judgment has been affirmed by the appellate court, and the case is now brought here for review, a certificate of importance having been granted by the appellate court.

The boxes being marked for shipment to St. Paul, when received by the defendant, it was its duty, *prima facie*, to carry to and deliver them at that place, though beyond its own line; and while it had the legal right to limit the liability, and refuse to take upon itself the duty of a through carrier by contracting to that effect with the shipper, it could not do so by a mere stipulation in its bill of lading not signed by the shipper, except by assuming the burden of proof that he accepted the bill of lading consenting to such stipulation. *Railway Co. v. Simon*, 160 Ill. 648, 43 N. E. 596, and cases there cited.

It being conceded, then, that it became the duty of the defendant to safely carry and deliver the goods at St. Paul, did that duty continue to exist at the time of the alleged loss? It is well settled that the duty of a railroad company as a common carrier terminates when it has carried the goods to their destination, and there placed them in its own safe, depot or other warehouse. *Gregg v. Railroad Co.*, 147 Ill. 550, 35 N. E. 343, and cases there cited. Nor is notice to

the consignee of the arrival or storage necessary to terminate liability as a carrier, but, upon warehousing, the liability is at once changed to that of warehouseman.

The court instructed the jury that the defendant was liable as a common carrier, notwithstanding the storage of the goods, unless it was shown that the shipper expressly assented to the limitation of the defendant's liability for loss or damages occurring on its own line. The action being against the defendant as a common carrier, these instructions are clearly erroneous, under the foregoing decisions, unless it can be said that the duty of the defendant was other than that of a common carrier by rail. In other words, if the connecting line which carried the goods to their destination had been a carrier by rail, their safe carriage and storage at St. Paul would have terminated the liability as a carrier whether the defendant's liability was limited to its own line or not. It is insisted, however, that the Diamond Jo Line, being a carrier by water, the liability could only be changed to that of a warehouseman by the storage of the goods upon due notice to the shipper of their arrival. That is the general rule, but such notice may be waived, either by the previous course of dealing between the parties or by the usual course of business of carriers in the same trade in which the carrier is employed at the locality where the goods are landed, and this whether the usage was known to the shipper or not. *Dixon v. Dunham*, 14 Ill. 324; *Farmers & Mechanics' Bank v. Champlain Tr. Co.*, 23 Vt. 186; *McMasters v. Railroad Co.*, 69 Pa. St. 374; *Turner v. Huff*, 48 Ark. 222. It was shown upon the trial of this case, and not denied, that the disposition of the goods at St. Paul was in strict accordance with the custom and usage of steamboat carriers at that point. We are also of the opinion that it must be inferred from the conduct of the shipper, in the absence of proof to the contrary, that he had actual notice of the arrival of the goods prior to the alleged wrongful delivery to Eaton & Jackson. Certainly it cannot be said there was no evidence tending to prove a waiver of notice of the arrival of the goods, or of actual notice of that fact, and, therefore, the instructions of the court were erroneous.

Williams was not, in fact, the agent of the Illinois Central Railroad Company for the delivery of goods at St. Paul, and this is not denied. The fact that he appeared from the letter heads furnished by the company to be its general agent, in no way influenced plaintiff's conduct, and, therefore, he is not in a position to insist that he was in any way misled thereby to his prejudice. By his order of July 6th, he undertook to authorize Williams to deliver the goods from time to time as he might direct, and by his subsequent orders

of July 9th and 14th, and August 4th, made him his own agent to transfer the goods. On the theory that it was the duty of the defendant to safely carry and deliver the goods at St. Paul, it was equally the duty of the consignor, who was also the consignee, to receive them upon their arrival. *Tarbell v. Shipping Co.*, 110 N. Y. 170, 17 N. E. 721.

Judgment reversed.

Opinion by WILKIN, J.

WEST CHICAGO STREET RAILWAY COMPANY ET AL. V. KENNEDY-CAHILL.

Supreme Court, Illinois, January, 1897.

STRUCK BY STREET CAR WHILE ALIGHTING FROM ANOTHER.—

Where a passenger was injured while alighting from a street car by the car of another company running against her, a judgment against both companies was not erroneous where it appeared that both were negligent.

SUBSEQUENT SICKNESS — EVIDENCE OF APPEARANCE.— Whether her subsequent sickness was caused by the injury or resulted from other causes was for the jury, and evidence of her appearance before and after the injury was properly admitted.

APPEAL from appellate court, First district, affirming judgment in favor of plaintiff.

D. W. MUNN, for appellants.

D. J. WILE, for appellee.

PER CURIAM. — This is an action by Annie Kennedy-Cahill, to recover damages for personal injuries alleged to have been sustained by reason of the joint negligence of the West Chicago Street Railroad Company and the North Chicago Street Railroad Company. The declaration alleges that on the 18th day of February, 1893, the plaintiff became a passenger on one of the defendant West Chicago Street Railroad Company's Halsted street cars, and that when the car reached the southern end of the viaduct, at Halsted and Sixteenth streets, the defendant West Chicago Street Railroad Company's servants negligently stopped the car, and invited the plaintiff to alight, and that while the plaintiff, relying upon such invitation, was attempting to alight therefrom, "the defendant North Chicago Street Railroad Company, by its servants, negligently ran against the plaintiff with a north-bound car, and thereby caught the plaintiff between said north-bound car and the one from which said plaintiff was attempting to alight, in consequence of which the plaintiff was

crushed between the two cars." At the trial the jury returned a verdict in favor of the plaintiff, and assessed her damages at the sum of \$2,000. On appeal to the appellate court, that judgment has been affirmed. No error is assigned upon the giving or refusal of instructions. No objection was made to the evidence offered upon the trial explanatory of the circumstances under which the accident occurred; nor is it claimed that there is no evidence tending to support the allegations of the declaration as to the negligent or wrongful acts of the servants of the defendant the West Chicago Street Railroad Company. It is, however, said that there is no evidence of negligence on the part of the North Chicago Street Railroad Company, and it is insisted that the judgment against the two defendants jointly was therefore erroneous. We do not regard the question as to whether there was any evidence fairly tending to show negligence on the part of the North Chicago Street Railroad as presented to this court for decision. The case was submitted to the jury upon all the facts, and instructions given on behalf of the defendant, and its finding and the judgment of affirmance in the appellate court conclusively settles that as well as all other controverted questions of fact in the case. But, if it were otherwise, it cannot be said that there is no evidence tending to prove, or from which it can be fairly inferred, that the driver on the North Chicago Street Railroad car was not guilty of negligence in failing to see the plaintiff and stop his car in time to avoid the accident. The only attempt to raise a question of law in this court is upon the ruling of the court in the admission of testimony. Certain witnesses, who lived in the same house with the plaintiff, or were intimate associates, were asked questions, in substance, as to her appearance of health and disposition before and after the injury, and were allowed to answer, over the objection of counsel for the defendants. The evidence showed that she was injured to a greater or less extent at the time of the accident; that she was confined to her bed for several weeks thereafter in consequence of those injuries; and that she ultimately went to a hospital, and was there treated for sickness which she claimed was occasioned by the injury received. It was a question for the jury whether the subsequent sickness was caused by that injury, or resulted from other causes, and we are unable to see why her appearance before and after the injury was not relevant to that issue, to be given such weight as the jury might think it entitled to. No authority is cited by counsel in support of the contention that the testimony is incompetent, and we find no error in this regard.

The judgment of the appellate court will be affirmed.

NORTH CHICAGO STREET RAILROAD COMPANY v. SOUTHWICK.

Supreme Court, Illinois, January, 1897.

OBJECTION TO REMARKS OF COUNSEL TO JURY.—Where the record showed that during the speech of plaintiff's counsel, the defendant's counsel repeatedly said "Exception to that statement," and the court said "Let the exception be noted," there were no rulings of the court and exceptions preserved as entitled the appellant to have the question of whether the court permitted the plaintiff's counsel to make improper remarks to the jury or not.

APPEAL from judgment of Appellate Court, First District, affirming judgment of Circuit Court in favor of appellee.

E. JAMIESON and J. A. ROSE, for appellant.

SCHUYLER & KREMER, for appellee.

WILKIN, J.—This is an appeal from the judgment of the appellate court affirming a judgment of the Circuit Court of Cook county in favor of appellee against appellant for the sum of \$3,000, for a personal injury alleged to have been received, while a passenger, from the negligence of the servants on one of its street car lines. The theory of plaintiff's case, set up in the various counts of her declaration, is that the car from which she was attempting to alight was suddenly jerked or started, throwing her to the ground, causing her injury. The principal controversy upon the trial was whether or not the car was suddenly jerked, as alleged, and on that question numerous witnesses were examined by the respective parties. It is contended by the appellant that the verdict of the jury is contrary to the clear preponderance of the testimony, and some argument is adduced in support of that contention, seemingly ignoring the fact that this court is not at liberty to review the action of the appellate court in that regard.

It is insisted that the court erred in refusing to allow a witness named Aldrich to answer certain questions intended to impeach a witness for the plaintiff — John Southwick, her father. The object of the questions was to show that Southwick had made statements to Aldrich which the former denied having made. It does not appear that Southwick did deny having made the statements to Aldrich in the manner indicated by the questions propounded him. Moreover, the questions were not as to facts material to the case. We think there was no error in refusing the proposed evidence.

The error most relied upon for a reversal of the judgment below is that the court permitted counsel for the plaintiff to make improper remarks to the jury. We have examined that part of the record, and are of the opinion that, as said by the appellate court, while counsel did not confine his remarks to the proper limit of the facts of the case, no such objections, rulings of the court, and exceptions were preserved as entitled the appellant to have that question ruled upon here. All that is shown is that, during the speech of counsel for the plaintiff to the jury, one of the attorneys for the defendant repeatedly said, "I take exception to that statement," "exception to that statement," and "exception," etc., and to perhaps three of such remarks the court said, "Let the exception be noted," or "Note the exception." These remarks, both by counsel and the court, amounted to nothing, as showing error in the record. The court made no ruling upon any objection to the statements of counsel. *Marder v. Leary*, 137 Ill. 319, 26 N. E. 1093. No reversible errors of law appear in this record. The judgment of the appellate court will be affirmed.

WEST CHICAGO STREET RAILROAD COMPANY v. MUELLER.

Supreme Court, Illinois, January, 1897.

CONFLICT OF EVIDENCE — CHARGE.—Where the plaintiff was injured in a collision with a street car at a crossing, and the evidence was conflicting as to whether the gong was sounded, an instruction that where certain witnesses testify that a fact took place and other witnesses testify that the fact did not take place, and both sets of witnesses had equal means of knowledge, the testimony of the latter witnesses is not negative, but should be regarded by the jury as affirmative evidence, is not erroneous.

APPEAL from judgment of appellate court, affirming a judgment of Circuit Court of Cook County in favor of appellee. (64 Ill. App. 601.)

E. JAMIESON and J. A. ROSE, for appellant.

MCCRACKEN & CROSS, for appellee.

The alleged injury resulted from a collision between a grip car of the defendant and an express wagon on which the plaintiff was riding at the crossing of Madison street and California avenue in the city of Chicago. The declaration consisted of three counts, the first charging the defendant with negligence in failing to sound a gong, the second in running its car at a high rate of speed, and the third

charging both these acts of negligence and setting up that plaintiff's view was obstructed by standing cars on another track. The judgment was for \$5,500. On the trial before the jury there was a conflict in the evidence as to the alleged acts of negligence. The court, at the instance of the plaintiff, gave this instruction to the jury which is assigned for error: "The court instructs the jury that when one or more witnesses testify to being present upon any occasion and that certain facts then took place, and other witnesses of equal credibility, having equal means of knowing what took place, testify that they were present on the same occasion, and that such facts did not take place, then the testimony of the latter witnesses is not what is known as "negative testimony," but it is entitled to be regarded by the jury as affirmative testimony; and in such case it is the duty of the jury to weigh all the testimony and give a verdict as the weight may preponderate to the one side or the other."

Whether the testimony of the witnesses swearing that the gong was not sounded should be treated as negative in no way depended upon whether other witnesses testified that it was sounded; and the instruction was, perhaps, liable to be understood by the jury as an intimation from the court that the testimony of a witness of the one class was entitled to the same weight as that of a witness of the other class, and, so understood, would be erroneous. It is never the province of the court to tell the jury which class of conflicting testimony is entitled to the greater weight. *Rockwood v. Poundstone*, 38 Ill. 199; *Railroad Co. v. Hillmer*, 72 Ill. 235. We think, however, taken as a whole, fairly and intelligently construed, it amounted to no more than telling the jury that if there was a conflict in the evidence of the witnesses as to whether a fact existed or not, it was the duty of the jury to weigh all the testimony and give a verdict as the weight might preponderate to the one side or the other.

Judgment affirmed.

Opinion by WILKIN, J.

CITY OF CHICAGO v. SEBEN.

Supreme Court, Illinois, January, 1897.

PLEADING AND PROOF.—Proof that the plaintiff fell into a hole, that was a sewer inlet, is not at variance with the allegation that he fell into a "hole over and into a certain catch-basin."

MUNICIPAL CORPORATIONS—FALLING INTO SEWER INLET.—A

person injured by falling into an inlet of a sewer may recover from the city, whether the unsafe condition of the street arose from faulty construction of the sewer, in accordance with an adopted plan, or from failure to repair after the sewer was constructed.

APPEAL from judgment of appellate court, First District (62 Ill. App. 248), affirming judgment for plaintiff.

ROY O. WEST, B. RICHOLSON and WORTH & CAYLOR, for appellant.
McCRACKEN & CROSS, for appellee.

Action for a personal injury to appellee. The appellant states the following facts: "On the evening of April 8, 1892, while John Miller Seben, a resident of Chicago, and a shoemaker by trade, was walking home after searching for work, he stepped into a sewer inlet at the corner of Polk street and Blue Island avenue, in the city of Chicago, and suffered a double fracture of his left leg, between the knee and the ankle. The night was very dark, there being a thunder storm and it was raining. He pulled himself out of the hole, and being discovered by the police, was taken to the Cook county hospital, where he remained for a year. He used crutches for seven months after leaving the hospital, and because of this injury, ever since, he has been unable to follow his trade of shoemaker." The declaration alleges that the city disregarded its duty and permitted a deep and dangerous hole over and into a certain catch-basin below said street to remain open and uncovered for a long time, to wit, for three weeks prior to the day of the accident, and that by reason of the time specified the defendant had due notice. Defendant filed plea of not guilty. The case was tried and the jury gave a verdict for plaintiff and judgment entered, which was affirmed by the appellate court and appeal taken therefrom.

Among the instructions asked by the city and refused by the court were the following: 1. "First the court instructs the jury, as a matter of law, that the defendant is not liable for any injury to the plaintiff caused by the sewer entrance complained of in this case, where said sewer entrance was constructed in accordance with a plan devised through no error of judgment, and no lack of care and skill and under the direction of the municipal authorities; and that the jury shall find the defendant not guilty if they believe the sewer inlet in controversy was so constructed." 2. "The court instructs the jury that the defendant is not liable in this case for constructing the sewer complained of, if the sewer was constructed in accordance with a general plan not in itself intrinsically dangerous, under the direction of the municipal authorities; and that the jury are to find the defendant not guilty if they believe the sewer inlet was so constructed."

Two defenses are relied upon by the city. The first is that there is a variance between the allegations of the declarations and the proof in that the declaration alleges that the plaintiff stumbled and fell into a catch-basin, and the proof offered shows that the plaintiff was injured by stepping into a sewer inlet situated several feet from the catch-basin. The second defense is that the sewer inlet in question was constructed in accordance with a general plan devised through no error in judgment, under the direction of the municipal authorities.

As to the variance. Proof that the plaintiff fell into a hole is not at variance with the allegation that he fell into a "hole over and into a certain catch-basin." The hole was really a sewer inlet, designed to carry the water off into the catch-basin. There is evidence tending to support the allegation of the declaration that the hole was over and into a catch-basin; and, therefore, the question of variance upon the plaintiff's whole proof was one of fact, which has been decided against appellant. *Harris v. Shebek*, 151 Ill. 287, 37 N. E. 1015.

As to the construction of the sewer inlet in accordance with the general plan, the question sought to be raised upon this branch of the case arises out of the refusal of the court to give the refused instructions of the defendant, which are set out in the preceding part of this opinion. It is well settled that municipal corporations have certain powers which are discretionary or judicial in character, and certain powers which are ministerial. Municipal corporations will not be held liable in damages for the manner in which they exercise in good faith their discretionary powers of a public or legislative or quasi-judicial character. But they are liable to actions for damages when their duties cease to be judicial in their nature, and become ministerial. 2 Dill. Mun. Corp. sec. 949, 832. A corporation acts judicially when it selects a plan, such as constructing sewers or drains; but as soon as it begins to carry out that plan it acts ministerially and is bound to see that the work is done in a reasonably safe and skilful manner. 2 Dill. Mun. Corp., sec. 1048, note 1. It is the duty of a municipal corporation to keep such sewers in good repair, and the duty is ministerial. A municipality which constructs and owns such sewers is liable for the negligent performance of such duties. *Johnson v. District of Columbia*, 118 U. S. 19, 6 Sup. Ct. 923; *Seifert v. City of Brooklyn*, 101 N. Y. 136, 4 N. E. 321.

The city of Chicago having adopted the city and village act (Rev. St. Ill. c. 24, art. 5, sec. 63), is required by law not only to construct but to keep in repair the culverts, drains, sewers and cesspools and is liable in damages for a neglect to perform said duties.

In the case at bar the declaration does not charge that the plan of the public improvement was defective, but it charges that the city neglected to keep the crossing of the two streets named in the declaration in good repair. The tendency of the proof was to show that whatever the size of the hole had been originally under the plan of the city, it had become enlarged and was out of repair, and that the paving blocks and dirt had been washed away and that the only gutter was a furrow through the mud. The refused instructions ignored the doctrine that where the city has adopted a plan and created an existing condition in a street in pursuance thereof, and that condition renders the street unsafe, the city must go further, and perform the duty cast upon it growing out of the statute to exercise ordinary care to make the street thus incumbered with the product of its plan reasonably safe for public travel.

The court committed no error in refusing the instructions asked.
Judgment affirmed.

Opinion by MAGRUDER, C. J.

WEST CHICAGO STREET RAILROAD COMPANY v. SULLIVAN.

Supreme Court, Illinois, January, 1897.

APPEAL. — The judgment of the appellate court cannot be reversed on account of the reasons given for the judgment being erroneous.

EVIDENCE. — In an action for injuries inflicted by a street car running over plaintiff, it is not error for a witness for plaintiff to testify that there were other persons present at the time of the accident.

IMPROPER REMARKS OF COUNSEL. — Where no objection is taken to the courts ruling that there should be no interruption of counsel, while arguing to the jury, the right to interrupt when an opposing counsel is making an improper argument is waived.

APPEAL from judgment, appellate court, First District (64 Ill. App. 628), affirming judgment for plaintiff.

E. JAMIESON and J. A. ROSE, for appellant.

SCANLAN & MASTERS, for appellee.

On February 4, 1892, appellee (then eight years old), was running across Van Buren street at its intersection with Aberdeen street, in the city of Chicago, and came in collision with a team of horses drawing one of appellant's street cars on Van Buren street. He was knocked down and lost an arm, and brought this suit to recover damages for his injuries, alleging that he was in the exercise of due

care and that the driver of the street car was negligent in failing to observe him, and in driving at a rapid rate. He obtained a judgment which was affirmed by the appellate court.

The appellant criticises the reasons given by the appellate court for affirming the judgment; the judgment of that court cannot be reversed on account of the reasons given for the judgment. The facts have been conclusively settled by the judgment of affirmance in the appellate court, and there are but two alleged errors of law.

The first complaint is that the court permitted a witness for plaintiff to testify that there were other persons present at the time of the accident. There was no error in the admission of the evidence.

The second supposed error is that there was improper argument on behalf of plaintiff. During the argument of plaintiff's counsel a question was raised as to the propriety of comments then being made. The judge stated that he would not permit interruptions of the argument, but that his rule was to permit either side to have the record show that they had saved exceptions to every statement of counsel on the other side, and that anything said by counsel on either side might be considered as having been excepted to. This course was pursued in making up the bill of exceptions, and exceptions were inserted wherever defendant's counsel saw fit. These exceptions were not to any rule or action of the court, but only to what plaintiff's counsel did. It is the right and duty of the judge to supervise the argument of counsel and see that it is fairly made (1). Where an injury appears to have been done by improper argument of counsel, the court should grant a new trial or an appellate court reverse the judgment; yet there is nothing to be reviewed on appeal or writ of error unless an objection has been made, and the ruling insisted upon at the time. *Railroad Co. v. Fletcher*, 128 Ill. 619, 21 N. E. 577; *Boone v. People*, 148 Ill. 440, 36 N. E. 99; *Pike v. City of Chicago*, 155 Ill. 656, 40 N. E. 567.

Judgment affirmed.

Opinion by CARTWRIGHT, J.

1. The court cited *Railroad Co. v. Fletcher*, 128 Ill. 619, 21 N. E. 577, where it is said: "A court hearing counsel under pretense of arguing a case making statements of matters to the jury not in evidence nor pertinent as illustrative of matters in evidence, should promptly stop the counsel, explain to the jury the impropriety of

his language and take such measures as shall be appropriate to prevent a repetition of such misconduct; and for a failure of duty in that respect, manifestly affecting the result, the judgment should be reversed." But the counsel should call the attention of the court to the statements at the time.

**BUTLER ET AL. V. PITTSBURGH, CINCINNATI,
CHICAGO AND ST. LOUIS RAILWAY
COMPANY.**

Appellate Court, Indiana, February, 1897.

PRACTICE. — When assignments of error are not discussed in the brief they are waived.

COMMON CARRIER — PLEADING. — In an action by a consignor against a common carrier for damages to hogs in transportation, where the complaint failed to allege ownership of the plaintiff it was demurrable.

PRACTICE. — Where a demurrer to the complaint is erroneously overruled and upon trial of the cause defendant recovers judgment, any error subsequent to the ruling on the demurrer is harmless.

APPEAL from judgment, Circuit Court, Henry County, in favor of defendant.

M. E. FORKNER, for appellants.

JOHN L. ROPE, for appellee.

Appellants were "partners, trading under the name of Farrell & Butler," and prosecuted this action against the appellee to recover damages for "unreasonable delay" in carrying two carloads of hogs from Bentonville, Ind., to Cincinnati, Ohio. The complaint is in one paragraph and is based upon a bill of lading or written contract which embraces all the conditions upon which appellee received and agreed to ship the stock. The bill of lading bears date of July 27, 1893, and the complaint avers that on that day the appellee owned and operated a system of railroads, as common carriers, through the village of Bentonville, Ind., etc.; that on said day appellants delivered to appellee two carloads of hogs at Bentonville to be shipped to Cincinnati, which appellee agreed to do with all "reasonable dispatch," and issued to appellants its bill of lading, and written contract and agreement, which bill of lading is made a part of the complaint by exhibit; that appellant failed to carry out its said agreement in this, viz.: that appellee carried said hogs on said day from Bentonville to Richmond, a distance of thirty miles, and there placed them on the side track unnecessarily and without cause, and allowed them to remain there twenty-four hours, without notice to appellants and without food or water or other attention; that at that time the weather was very warm; that the hogs were very fat and perishable in their nature, and that by reason of said delay six of

said hogs died and others shrank in weight, etc., and appellants were compelled to sell said hogs for \$150 less, etc., and appellants were damaged, etc. It is unnecessary to set out the bill of lading, which is in the usual form. The appellee demurred to the complaint, was overruled and appellee excepted. Appellee answered, reply in general denial, trial by jury and verdict for appellee. Motion by appellants for new trial overruled and appellants appeal.

The learned counsel for the appellants, after fully stating in his brief the facts averred in the complaint, and proven at the trial, makes the following statement: "We appeal this case strictly upon the instructions given by the court." Having failed to discuss any other questions presented in the record, they are, under the familiar rule, waived. There are, therefore, but two questions in this case for our decision and determination, viz.: 1. The action of the court in overruling the demurrer to the complaint; and, 2. Whether or not there was reversible error in the instructions given by the court, of which appellants complain.

If the first question is resolved in favor of appellee, then the second need not be determined, for in that event the judgment must be affirmed. The appellee insists that the complaint is fatally defective for the reason that it fails to aver ownership of the property described in the complaint of the appellants. There is no direct averment that the appellants were the owners of the property shipped, nor does it state to whom the stock was consigned. The bill of lading, which was a special contract, shows that the appellee received the property of Farrell & Butler, and that it was consigned to Hodleston, Hubbard & Co., Cincinnati, Ohio. Appellee contends that as the complaint is silent as to ownership of the property, the presumption of law is that the title is in the consignee. From the authorities this proposition seems firmly established. *Railway Co. v. Whitesel*, 11 Ind. 54; *Railroad Co. v. Holderman*, 69 Ind. 18; *Pennsylvania Co. v. Poor*, 103 Ind. 553, 3 N. E. 253. The Supreme Court of the United States has so declared the law. *Grove v. Brien*, 8 How. 429; *Lawrence v. Mintern*, 17 How. 100. We conclude, therefore, that the complaint is bad and does not state a cause of action in appellants by its affirmative allegations. We are not unmindful of the rule in this State that where the complaint does not state a material fact directly, but such fact is shown to exist in the pleading by necessary implication, the complaint is sufficient as to such fact. *Douthit v. Mohr*, 116 Ind. 482, 18 N. E. 449; *Railway Co. v. Case*, 122 Ind. 310, 23 N. E. 797. We look in vain for such other facts pleaded as will imply ownership in appellants. The court cannot examine the evidence to determine a question

presented by demurrer. *Pennsylvania v. Poor*, *supra*; *Friddle v. Crane*, 68 Ind. 583; *Weir v. State*, 96 Ind. 311, 315.

If the ruling of the court on the demurrer was error and the complaint did not state a cause of action in favor of appellants, then they cannot be heard to complain of subsequent errors that were prejudicial to them. *Manufacturing Co. v. Booth*, 10 Ind. App. 364, 37 N. E. 818; *Walbrun v. Babbitt*, 16 Wall. 577; *Evans v. Pike*, 118 U. S. 241, 6 Sup. Ct. 1090.

Judgment affirmed.

Opinion by WILEY, J.

WESTERN UNION TELEGRAPH COMPANY v. BRYANT.

Appellate Court, Indiana, February, 1897.

FAILURE TO DELIVER TELEGRAM.—A failure to deliver a telegram that read: "Cannot come to-day; will come to-morrow," will not authorize a recovery for mental distress occasioned thereby, to the woman who sent it and whose husband failed to meet her, nor for the physical discomfort suffered by her in having to carry heavy bundles several blocks (1).

APPEAL from judgment, Circuit Court, Monroe County, in favor of plaintiff.

LOUDEN & LOUDEN, for appellant.

EAST & MILLER and JAMES E. STEELE for appellee.

The appellee sought to recover damages against appellant for failure to transmit and deliver a telegraph message to her husband. Trial by jury and judgment for \$105. The complaint was in two paragraphs. The first was for the statutory penalty. The second for special damages arising from the failure of the defendant to transmit and deliver the message. The jury were instructed that under the first paragraph of the complaint they could not allow the plaintiff more than \$100. As the verdict returned is for \$105, it is evident that their finding was upon the second paragraph. We do not, therefore, deem it necessary to say more in reference to the second paragraph than that so far as any defects are pointed out it is sufficient. It is alleged in the second paragraph: That on the 4th day of December, 1894, plaintiff placed in the hands of defendant's agent at Indianapolis, Ind., the following message: "Indianapolis, Indiana, December 4th, 1894. To John Bryant, Bloomington,

1. See *Curtin v. Western Union Tel. Co.* (N. Y.) 1 Am. Neg. Rep. 127, *ante*.

Indiana: Cannot come to-day; will come to-morrow. Nancy Bryant." That she paid the usual charges. That defendant agreed to transmit, but failed negligently to deliver the same to John Bryant, who is her husband. That she was staying in Indianapolis with some friends and had previously informed her husband that she would arrive home on the fourth, and he was to meet her at the train. That she returned the next day, and because of the failure of the defendant to deliver the telegram, her husband failed to meet her, and she was annoyed and distressed in body and mind. That she was obliged to carry heavy bundles to her home several blocks away. That she made a written demand on defendant for \$100. Direct and proximate damages resulting from the negligence of telegraph companies may be recovered in any event. Indirect, collateral or consequential damages resulting from such negligence may also under some circumstances be recovered. The expression that the sender of a telegram is entitled to such damages as are the natural and proximate consequences of the company's negligence is frequently found in judicial opinions (1). There is a conflict in the decisions of the courts of the different States as to whether damages may be recovered for mental distress alone when not connected with physical injury or pecuniary loss (2). It is the law in this State,

1. Earl, C. J., says, in *Leonard v. Telegraph Co.*, 41 N. Y. 544: "The cardinal rule undoubtedly is that the one party shall recover all the damages which have been occasioned by the breach of the contract by the other party. But this rule is modified in its application by two others. The damages must flow directly and naturally from the breach of the contract and they must be certain both in their nature and in respect to the causes from which they proceed. Under this latter rule, speculative, contingent and remote damages, which cannot be directly traced to the breach complained of, are excluded. The damages must be such as the parties may be fairly supposed to have contemplated when they made the contract." In *Baldwin v. Telegraph Co.*, 45 N. Y. 744, it is said: "When a special purpose is intended by one party but is not known to the other, such special purpose will not be taken into account

in the assessment of damages for the breach."

2. *Decisions allowing mental damages:*

—*Stuart v. Tel. Co.*, 66 Texas, 580; *Wilson v. Gulf, etc. R. Co.*, 69 Texas, 739; *Western Union Tel. Co. v. Adawans*, 75 Texas, 531; *Wadsworth v. Tel. Co.*, 86 Tenn. 695; *Western Union Tel. Co. v. Henderson*, 89 Ala. 510; *Thompson v. Tel. Co.*, 106 N. C. 549; *Sherrill v. Tel. Co.*, 109 N. C. 527; *Beasley v. Tel. Co.*, 39 Fed. Rep. 181; *Chapman v. Tel. Co.*, 90 Ky. 265; *Mentzer v. Tel. Co. (Iowa)* 62 N. W. 1.

Decisions denying mental damages:—*Chase v. Tel. Co.*, 44 Fed. 554; *Kester v. Tel. Co.*, 55 Fed. 603; *Gahan v. Tel. Co.*, 59 Fed. 433; *Russell v. Tel. Co.*, 3 Dakota, 315; *Western Union Tel. Co. v. Rogers*, 68 Miss. 748; *Inter. Ocean Tel. Co. v. Saunders*, 32 Fla. 434; *Connell v. Tel. Co.*, 116 Mo. 35; *Chapman v. Tel. Co.*, 88 Ga. 763; *Summerfield v. Tel. Co.*, 87 Wis. 10; *Wiman v. Leavitt*, 71

however, that damages may be recovered for negligence causing mental distress alone. *Reese v. Telegraph Co.*, 123 Ind. 294, 24 N. E. 163; *Telegraph Co. v. Newhouse*, 6 Ind. App. 422, 33 N. E. 800. The courts which hold that damages for mental suffering alone may be recovered base the recovery upon the fact that the language of the message gives direct notice to the telegraph company that the message concerns such event or events as that negligence on the part of the company is likely to be followed by mental distress. The telegraph company, then, has the measure of responsibility, and is held liable for special damages for negligence. The language of the message of appellee did not advise the company that a failure to deliver it would be likely to cause mental distress. The physical discomforts of which plaintiff complains are damages too remote to permit a recovery. *Stafford v. Telegraph Co.*, 73 Fed. 273; *McAllen v. Telegraph Co.*, 70 Tex. 243, 7 S. W. 715. Still the second paragraph of the complaint alleges a valid contract between plaintiff and defendant and its breach by the latter, and these allegations, if proven, would entitle the plaintiff to nominal damages, the amount paid for transmission of the message.

Judgment reversed.

Opinion by COMSTOCK, C. J.

CINCINNATI, HAMILTON AND INDIANAPOLIS RAILROAD COMPANY v. REVALEE.

Appellate Court, Indiana, February, 1897.

PLEADING.—An allegation that the plaintiff, when the train almost stopped, stepped out on the platform and attempted to alight when it stopped, and was thrown off by the train suddenly starting, does not show contributory negligence.

ALIGHTING FROM MOVING TRAIN.—Where it appeared from the plaintiff's evidence that she got on the lowest step while the train was slowly moving, and it didn't stop but gave a jerk, and to save herself from falling she jumped off, and the defendant's evidence showed that she jumped off the moving train against the remonstrance of the employees, the questions of negligence were for the jury.

Me. 227; Ferguson v. Davis Co., 57 Iowa, 601; *Francis v. Tel. Co.* (Minn.); *Curtin v. Western Union Tel. Co.* (N. Y.) 1 Am. Neg. Reports, 127. See *Primrose v. Tel. Co.*, 154 U. S. 1, sustaining validity of conditions contained in telegraph blanks, that to incur liability for failure the message must be repeated at additional cost. *Birkett v. Tel. Co.*, 103 Mich. 361.

PLEADING—VARIANCE.—An allegation in the complaint that, after the train had stopped, the plaintiff was thrown from the lowest step by the sudden jerk of the train, is not a variance that is material with the plaintiff's evidence that she was thrown from the step by a sudden jerk while the car was slowly moving.

APPEAL from judgment, Circuit Court, Fayette County, in favor of plaintiff.

R. D. MARSHALL and THOMAS M. LITTLE, for appellant.

CONNER & MCINTOSH, for appellee.

It is contended on behalf of the appellant that the complaint shows that the appellee's negligence contributed to her injury. It is urged that for a woman to go upon the platform, or down on the steps, with a child two years old in her arms, when the train is in motion, is negligence. The complaint alleges that appellee was at the door when the train had reduced its speed until it almost stopped; that she then stepped out on the platform, "at which time the train wholly stopped," etc. If the complaint shows that the appellee went upon the platform while the train was in motion, it does not show that she descended the steps and attempted to alight while it was in motion. It shows with sufficient certainty that she descended the steps and attempted to alight when the train stopped, and that thereafter the train was started with a violent jerk, by reason of which she was thrown off the step to the stone platform; that the train did not stop long enough for her to alight in safety, but it barely came to a stop until it was started with a violent jerk. It does not appear from the complaint that the appellee was injured while she was upon the platform, or that her going upon it caused her injury, or contributed directly to it. If she had remained there, she would have been in a place of safety. We cannot say, then, that it was negligence for her to go out upon the platform. The particular allegations of the complaint are not so inconsistent with its general allegations that the appellee was without fault or negligence as to overcome the effect of those general allegations. The objection made to the complaint in argument does not seem to be well taken.

The evidence introduced by the appellee tended to prove that she had previous knowledge of the locality; that before reaching the station a trainman announced it in the car, and told the passengers to be prepared and that the train was a little late; that when the train whistled for the station she took her child on her left arm and went to the front door, her father and her sister-in-law following; that she opened the door and went out upon the platform; that the train was slowing up when she opened the door, and it slowed up

until she thought it was ready to stop, and she stepped down to the lower step, and stood with her child on her left arm and held onto the projecting iron on the side of the car with her right hand, and had her right foot extended ready to make the step off when the train should stop; that it did not stop but started up with a jerk, which made her lose her balance and threw her, and when she knew she was going she made the jump to save herself from falling and alighted upon a cement platform on the back of her head and left shoulder, arm and hip; that when she started down the steps the train was slowing up so that a person would think it would stop; that it was just barely moving.

The evidence of the appellant tended to prove that the train stopped from a minute and a half to three minutes; that passengers got on and off; that after the conductor seeing no more passengers coming off or getting on, had given the signal to start, and after the train had started appellee went down the car steps and stepped off; that a brakeman standing on the depot platform saw the appellee come out of the car and step down as if to get off; that he hallooed to wait and not jump off, and gave a signal to stop the train; that the train ran about three car lengths, but before it stopped, and after it had run about half the length of a car, appellee jumped off.

In *Reibel v. Railroad Co.*, 114 Ind. 476, 17 N. E. 107 (1), the general rule was stated that a passenger getting on or off a moving train cannot recover for injuries, but that to this general rule some exceptions have been recognized. In *Railroad Co. v. Crunk*, 119 Ind. 542, 553, 21 N. E. 31 (2), it was said: "We cannot adhere to the doctrine that the attempt to voluntarily leave a moving train, regardless of the speed and circumstances under which the attempt is made, is negligence *per se*." See *Railroad Co. v. Wingate*, 143 Ind. 125, 37 N. E. 274 (3). Regarding the facts all together, and considering them in connection with the authorities, we are of the opinion that the question as to whether the evidence most favorable to the appellee did or did not show her to be free from contributory fault was one for the jury to determine under proper instructions from the court. The question as to contributory negligence determined by the jury under the evidence produced by the appellee, was not one of voluntarily alighting from a moving train, but one of

1. *Reibel v. Cin. Ind. St. L. etc. R'y Co.*, 114 Ind. 476, is reported in 3 Am. Neg. Cas. 219. *Crunk*, 119 Ind. 542, is reported in 3 Am. Neg. Cas. 229.

2. *Louisville & Nash. R. R. Co. v.*

3. *Toledo, St. L. & Kan. City R. R. Co. v. Wingate*, 143 Ind. 125, is reported in 3 Am. Neg. Cas. 300.

going upon the lower step of a slowly moving car, and, the car still slowly moving, standing there, and waiting with the intention of alighting when the train should cease to move. The difference between such cases is not an insignificant one.

It is earnestly argued by the appellant that the trial proceeded upon a different theory from that set out in the complaint which alleged that the train stopped, while the appellee's evidence upheld the theory that the train did not stop. The proximate cause of the appellee's injury was not her going down upon the lower step, or her standing there while the train was moving slowly, nor was it the slow motion of the train while she went down the steps or while she stood upon the lower step; but the wrongful and sudden jerk which threw her off her balance, and caused her to fall, was the proximate cause. The complaint and the evidence most favorable to the appellee both showed as the proximate cause the starting with a sudden jerk. The appellant does not appear to have been misled as to its defense.

Judgment affirmed.

Opinion by BLACK, J.

TOWN OF SALEM v. WALKER.

Appellate Court, Indiana, February, 1897.

BURDEN OF PROOF.—The burden is on the plaintiff to show freedom from contributory negligence in an action for personal injuries.

DEFECTIVE HIGHWAY—CONTRIBUTORY NEGLIGENCE.—A horseman who, after his horse takes fright at an obstruction in the highway, forces the horse to the obstruction the second time, and is thereby injured, is guilty of contributory negligence.

STREETS.—A traveler is not excused from the exercise of ordinary care because a town or city neglects to keep the streets in a reasonably safe condition.

APPEAL from judgment, Circuit Court, Washington County, in favor of plaintiff.

MITCHELL & MITCHELL, for appellant.

ZARING & HOTTEL, for appellee.

The appellee sued the appellant to recover damages for an injury received by being thrown from his horse, which became frightened at certain obstructions in a road or street within the corporate limits of the town of Salem. The complaint was in two paragraphs. Demurrers for want of facts overruled, and exceptions taken.

A trial of the issues formed resulted in a verdict for the appellee, upon which the court rendered judgment over appellant's motion for a new trial.

Appellant has assigned as error the overruling of its demurrer to the complaint and its motion for a new trial. Among the reasons assigned in the motion for a new trial are that the verdict is contrary to the law and the evidence, and is not sustained by sufficient evidence. It is insisted by appellant that the evidence fails to show that the appellee was himself free from negligence, but that the evidence shows that he was guilty of negligence which contributed to his injury. It is well settled that, in an action of this kind, contributory negligence on the part of the plaintiff is not a matter that the defendant must establish, but that the plaintiff must allege in his complaint, and prove, that the injury was incurred without his own negligence having contributed thereto. The burden is on him to show, not only the negligence of the defendant, but also his own freedom from any negligence contributing to the injury. His failure to establish either will defeat a recovery. The evidence shows that at the time of the injury there was, on a certain street or road within the corporate limits of the town, an accumulation of rubbish, consisting in part of brickbats, boxes, and barrels; that in the heap had also been thrown some fish, which at that time gave off a very offensive odor. This rubbish was close to the traveled part of the street or road on which the injury occurred. On the day of the alleged injury, the appellee, a young man about twenty-five years old, was riding alone, on horseback, into the town of Salem, on the road or street above mentioned. The horse he was riding was three years old, and gentle.

The appellee testified that as he was coming along on the Old Grade road and came near this obstruction, his horse took fright, refused to pass it and turned around. He stopped the horse and rode him up to the place where he first became frightened, and the horse then snorted and reared and fell back on the appellee. He further testified on cross-examination, that it was the barrels or the fish that frightened the horse, and that after the horse had already scared at the barrels the appellee urged him up to the barrels again, and then it was he reared and fell back on the appellee.

It is the law that it is the duty of a city or town to keep the streets in a reasonably safe condition for travel. *Michigan City v. Boeckling*, 122 Ind. 39, 23 N. E. 518; *Michigan City v. Ballance*, 123 Ind. 334, 24 N. E. 117; *City of Columbus v. Strassner*, 124 Ind. 482, 25 N. E. 65. But this does not excuse the appellee from the exercise of ordinary care for his own safety if the

streets are not in a safe condition (1). *Riest v. City of Goshen*, 42 Ind. 339; *Bruker v. Town of Covington*, 69 Ind. 33; *Town of Gosport v. Evans*, 112 Ind. 133, 13 N. E. 256. But one is not bound to forego travel upon a highway or sidewalk because he knows it is out of repair or even dangerous. *Town of Albion v. Hetrick*, 90 Ind. 545; *City of South Bend v. Hardy*, 98 Ind. 577. But the care in such case to avoid injury must be in proportion to the danger the traveler might encounter by reason of the defect or obstruction. *City of Huntington v. Breen*, 77 Ind. 29. See *Railway Co. v. Brannigan*, 75 Ind. 490; *City of Indianapolis v. Cook*, 99 Ind. 10; *Turnpike Co. v. Jackson*, 86 Ind. 11. The facts as to the manner in which this injury occurred are undisputed, and in such a case it becomes the province of the court to determine whether or not they amount to negligence. *Railway Co. v. Eves*, 1 Ind. App. 224, 27 N. E. 580. When appellee's horse became frightened at first sight of the obstruction, the appellee was fully apprised of the danger. Had this injury occurred when the horse first came on the obstruction, the appellee would have a far different case from the one presented by this record. He was under no compulsion to urge the horse a second time up to the object. He voluntarily and unnecessarily encountered the danger, and it cannot be said that he was exercising ordinary prudence in doing so, but that he did so at his own risk. Appellee's failing to establish that his own failure to exercise ordinary care did not contribute to bring about the injury, it is not necessary to decide whether the town of Salem was guilty of negligence in permitting the street to become in the condition it was.

The judgment is reversed, with instructions to grant a new trial.
Opinion by ROBINSON, J.

1. Where there is danger and the peril is known, whoever encounters it voluntarily and unnecessarily cannot be regarded as exercising ordinary prudence, and, therefore, does so at

his own risk. *Riest v. City of Goshen*, 42 Ind. 339; *Corlett v. City of Leavenworth*, 27 Kan. 673; *Schaeffer v. City of Sandusky*, 33 Ohio St. 245; *Town of Gosport v. Evans*, 112 Ind. 133.

CHICAGO AND ERIE RAILROAD COMPANY v. THOMAS (1).

Supreme Court, Indiana, February, 1897.

KILLED AT RAILROAD CROSSING—PLEADING.— In an action for damages for negligence, in causing death at a railroad crossing, a complaint that alleges that the defendant negligently allowed lumber to be piled on its right of way, thereby obstructing the view of approaching trains, but not alleging that the view of decedent was thereby obstructed; that one of defendant's trains struck and killed the decedent, and that the train was being run at an unlawful rate of speed, and that no signals of its approach were given, without alleging that such negligent acts were the cause of the death, does not state a cause of action.

CONTRIBUTORY NEGLIGENCE.— An allegation that the death occurred while the decedent was passing over the crossing, without carelessness or negligence, and while using due care, does not show absence of contributory negligence.

APPEAL from judgment, Circuit Court, Huntington County, in favor of plaintiff.

KENNER & LESH and W. O. JOHNSON, for appellant.

FRANCE & DUNGAN, J. C. BRANYAN, LEVI MOCK and DAILEY, SIMONS & DAILEY, for appellees.

This was an action brought by appellee for damages resulting from the death of his decedent, James L. Platt, caused, as alleged, by his being run over by one of appellant's passenger trains. A former appeal was dismissed for the reason that it had not been taken from a final judgment, but from an interlocutory order. *Thomas v. Railroad Co.*, 139 Ind. 462, 39 N. E. 44. The second trial resulted in a verdict and judgment for \$8,000 in favor of appellee.

Error is assigned in overruling the demurrer to each paragraph of the complaint. It is alleged in the second paragraph, in which are embraced the material allegations of the first paragraph, "That on the 14th day of January, 1892, the said railroad company had negligently and carelessly suffered and permitted certain persons to pile large and high quantity and to build a lumber deck on their grounds and on their right of way, thereby obstructing the view of persons traveling on said street until they arrive on the main track of said road, and such obstructions making it impossible to ascertain what cars are approaching until reaching said main track; and that

1. See *Atchison, T. & S. F. R. Co. v. Willey* (Kan.), 48 Pacific Rep. 25, action for damages for negligence in allowing grove of trees to remain on company's right of way at highway crossing and obstructing view.

on the 14th day of January, 1892, James L. Platt was driving across the defendant's railroad track at a point where Lee street crosses said road in said town of Markle, with two horses and a mud boat, and while passing over said crossing without carelessness or negligence on his part, and while using due care and caution, one of the defendant's passenger trains ran over, struck and killed the said James L. Platt; that said passenger train, in approaching said crossing, and the persons managing said train, failed and neglected to sound the whistle or ring the bell in approaching said crossing, and was carelessly and negligently running at a great and unlawful rate of speed through said incorporated town, to wit, at the rate of forty miles an hour."

It must be said that the complaint is a most imperfect pleading. If every allegation were proved, there could still be no recovery. The allegations in immediate relation to the accident, both as to the appellant's negligence and as to the decedent's freedom from contributory negligence, are quite insufficient. Because such lumber piles might obstruct the view of travelers on the street, it does not follow that they obstructed the view of the decedent. It is not of itself negligence to erect a structure upon a railroad right of way. If such structure obscures the traveler's view of the track, that will only make it necessary both for those in charge of trains and also for the traveler himself to approach the crossing with the greater care. Trains have approached crossings without blowing the whistle or ringing the bell, and while moving at the rate of forty miles an hour, and yet no one has been hurt. Because an act is negligent, and some one is hurt, it does not follow that the hurt is a consequence of the negligence (1). Liability can arise only from an act of negligence which either of itself, or in connection with other causes, brings or helps to bring about the injury; and such act of negligence must be alleged and proved. *Railway Co. v. Young*, 45 N. E. 479 (Ind.) (2).

1. It is a general rule in actions for negligence, that at least three propositions must concur before a liability arises: Negligence on the part of the defendant, which negligence is the proximate cause of the injury complained of, and that negligence of the person injured does not contribute to the injury. *Railway Co. v. Duncan*, 143 Ind. 524, 42 N. E. 37; *Railway Co. v. Stick*, 143 Ind. 449; 41 N. E. 365; *Railroad Co. v. McKean*, 40 Ill. 218;

Cosgrove v. Railway Co., 13 Hun, 329; *Barringer v. Railway Co.*, 18 Hun, 398.

2. The fact that the negligence of the defendant was the proximate cause of the injury must affirmatively appear to constitute a good complaint. *Railway Co. v. Conn*, 104 Ind. 64; *Corporation v. Matthews*, 92 Ind. 213; *Railway Co. v. Krapf*, 143 Ind. 647, 36 N. E. 901.

It does not appear from the complaint that the decedent was himself free from negligence contributing to his injury. A general allegation that the decedent had been injured without his own fault might have been sufficient, but the statement that he used due care while in the act of crossing is very far from showing that he was injured without fault on his part contributing to the injury. *Riest v. City of Goshen*, 42 Ind. 339; *Railway Co. v. Johnson*, 96 Ind. 40; *Railway Co. v. Duncan*, 143 Ind. 524, 42 N. E. 37.

The case of *Railway Co. v. Bodemer*, 139 Ill. 596, 29 N. E. 692, cited by counsel to show that the running of a train through a city or town at the rate of forty miles an hour without ringing a bell or sounding a whistle is an act of wilful negligence, is not in point, as the complaint here was not for a wilful injury.

Judgment reversed, with directions to sustain the demurrer to each paragraph of the complaint.

Opinion by HOWARD, J.

LOUISVILLE, NEW ALBANY AND CHICAGO RAILWAY COMPANY v. SCHMIDT.

Supreme Court, Indiana, February, 1897.

HORSE FRIGHTENED AT RAILROAD CROSSING, CAUSING INJURY TO PERSON IN WAGON.—Where the plaintiff, about to drive across a railroad crossing near which an engine was standing, inquired of those in charge of the engine if it was safe to do so, and was assured that it was, and while driving across, the steam escaped from the engine with a very loud noise, causing the plaintiff's horse to run away and throw the plaintiff out of the wagon, the company was liable for the injuries, though the steam escaped without the active agency of any of the employees.

APPEAL from judgment, Circuit Court, Hendricks County, in favor of plaintiff. Former appeal, 134 Ind. 16; 33 N. E. 774.

FIELD & KINNAN and BRILL & HARVEY, for appellant.

GEORGE W. SPAHR and LEWIS C. WALKER, for appellee.

This is an action by the appellee to recover damages for the alleged negligence of appellant, which resulted in her sustaining serious personal injuries. There was a special verdict, and upon the facts found the trial court awarded appellee a judgment. On July 5, 1890—the time of the accident—appellee, who was about seventeen years of age, accompanied by her brother, who was fifteen years old, and also by another boy of the age of fourteen years, was riding in a light wagon, taking flowers to market in the city of Indianapolis.

At a point on East street, a public street in said city, where appellant's railroad track crosses said street, a locomotive belonging to defendant was standing, and before attempting to cross, appellee sent one of her companions to the engineer to ask him if it was safe to cross; the engineer answered "Yes," and further said that they were not going to pull out for half an hour; the boy also asked the flagman if they could cross and he said "Yes," and motioned for them to come over. While they were crossing, the locomotive blew off steam, which frightened the horse attached to the wagon, causing him to run away.

Briefly stated, the special verdict, among other things, discloses that on the day of the accident, the appellant, by its servants, took the freight engine in question from the round-house, a short distance from the East street crossing, and backed it to a point within thirty feet of said crossing, and there stopped the engine and the cars attached to it to wait orders to go to the yards of appellant, some two or three miles distant; that at the time the engine reached the crossing, and while it remained there, it carried an unnecessary and excessive amount of steam for the work that it was to perform; that East street is in a populous part of the city of Indianapolis, and both the street and crossing are much used by persons passing in vehicles drawn by horses; that the engine remained there for several minutes, the precise time being shown by the evidence, and while standing near the crossing, the engineer or fireman thereon were engaged in oiling and cleaning the engine, and while so standing, the engineer saw and knew that the steam pressure was increasing and had already reached 140 pounds, the point of explosion, and that it was liable at any moment to escape through the valve. With knowledge of these facts, it appears that no precaution whatever was taken by appellant to stop the increase of the steam pressure, and thereby prevent it from escaping as it did, although, as disclosed by the verdict, some simple methods or means might have been employed to avoid that result. Under these circumstances, appellant invited appellee to cross and gave assurance to her that it was safe for her to go over the crossing; and while in the act of so doing, the steam was suffered or permitted to escape or blow off with a very loud or unusual noise, which frightened her horse and resulted in the injury of which she complains. The special verdict, in our opinion, substantially responds to the second paragraph of the complaint, and the facts embraced therein under the circumstances impute actionable negligence to appellant. The rights and duties of these parties at this public crossing were mutual or equal, and both were respectively bound to do what the law required. *Railway Co. v. Walker,*

113 Ind. 196, 15 N. E. 234. In *Billman v. Railroad Co.*, 76 Ind. 174, it is said: "The liability of horses to take fright at unusual noises or objects is a thing to be apprehended and guarded against." See *Railroad Co. v. Boettcher*, 131 Ind. 82, 28 N. E. 551. We think that under the particular circumstances and facts the appellant must be adjudged guilty of negligence in like manner as though the steam upon the occasion in controversy had been blown off through the active agency of its servants in charge of the engine. The authorities affirm that when a person rides or drives up to a railroad crossing by the invitation or direction of a flagman or gate-keeper there stationed, and is injured at such crossing from trains, machinery or appliances of the railroad company, he has the right to recover, because the invitation or direction was an assurance of safety upon which he had a right to rely. 4 Am. & Eng. Enc. Law, p. 931; *Railway Co. v. Keely*, 138 Ind. 600, 37 N. E. 406; *Railroad Co. v. Horst*, 110 Pa. St. 226, 1 Atl. 217 (1). The court did not err in awarding judgment in favor of appellee upon the special verdict.

Judgment affirmed.

Opinion by JORDAN, C. J.

ATCHISON, TOPEKA AND SANTA FE RAILROAD COMPANY v. LONG.

Court of Appeals, Kansas, Southern Dept., March, 1897.

PLEADING — ACTION EX CONTRACTU OR EX DELICTO. — The question as to whether an action is *ex contractu* or *ex delicto* is to be determined solely by the pleadings; and a petition which demands compensation for the wrongs committed upon the plaintiff and not upon an implied promise to reimburse, declares upon an action *ex delicto*.

1. The court cited also *Keech v. Railroad Co.*, 35 St. Rep. 902; 13 N. Y. Supp. 149, where it appeared that as the plaintiff approached a railroad crossing where the defendant's engine and cars had stopped, the plaintiff inquired if it was all right for him to go on. A servant on the engine replied: "It is all right; go ahead." Plaintiff did so, and when abreast of the engine and within forty feet of it the steam began to escape from its "pop whistle" and alarmed his horse, causing it to throw him from the buggy and breaking his leg. It appeared that the "pop whistle" was not under the control of the engineer. The court held that, although there was no evidence of negligence in the operation of the engine, the assurance of safety made to the plaintiff without reservation implied the control of the engineer over the engine and its instruments of alarming sounds, and that the defendant was liable for plaintiff's injuries received in acting upon the assurance,

INSTRUCTION.—An instruction predicated upon the theory that a ticket was from Topeka to Reading could not aid the jury when they find that the ticket was, in fact, from Topeka to Emporia.

EJECTING PASSENGER FROM TRAIN.—Where a passenger is forcibly evicted by the agents of the railroad company from its train, upon which he has a legal right to remain, and where the jury find that the said agents in the examination of the ticket presented by the passenger and in evicting him from the train, are grossly and wantonly negligent of the rights of such passenger, they may award exemplary damages.

FROM judgment of District Court, Butler County, in favor of plaintiff, defendant brings error.

A. A. HURD, R. DUNLAP and W. LITTLEFIELD, for plaintiff in error.

REDDEN & SCHUMACHER, for defendant in error.

The first count in the petition alleges that the plaintiff, John W. Long, on March 4, 1888, bought and paid for a ticket from the defendant company, that entitled him to ride as a first-class passenger over the road in the cars from Topeka to Emporia; that he entered the said cars and conducted himself in a proper manner; that after passing Reading and before the train reached Emporia, the servants of the company did, on said 4th of March, in the night-time of a stormy night, wrongfully, forcibly, wantonly and unlawfully, force and expel him from said cars and refuse him permission to ride any further upon said ticket without his paying additional and illegal charges, thereby wilfully and wantonly placing this plaintiff in the ignominious position of being put off the train, which was filled with passengers, and then, there and thereby, wrongfully, forcibly, wantonly and unlawfully did to Long other wrongs to his damage in the sum of \$1,000. The second count of the petition reiterates the charges contained in the first count, and in addition thereto, alleges that the railroad company, by its agents, demanded of Long sixty cents to permit him to ride to Emporia, and by the means and in the manner aforesaid, wantonly, maliciously and unlawfully compelled Long to pay sixty cents for such permission, to his damage in the sum of \$50. The prayer for judgment was for \$1,050. The answer was a general denial. It is not contradicted that Long asked the ticket agent at Topeka, between twelve and one o'clock in the night-time of March 4, 1888, just before the departure of the west-bound train, for a ticket for Emporia; that he paid \$1.85, the regular price, and that he received a ticket; that he glanced at it, and that if it had not been from Topeka to Emporia he would have noticed it; that it was that ticket he gave to the collector when he came for it after leaving Topeka; that soon after

leaving Reading the collector demanded sixty cents as his fare from Reading to Emporia, which Long refused to pay and the collector called the conductor and brakeman, the train was stopped, and the conductor took hold of Long and ejected him from the car; that after reaching the steps of the car platform and discovering that he was not near any station or house, and the night being cold and stormy, he paid the sixty cents under protest and rode to Emporia. The testimony was conflicting as to whether the ticket read to Emporia or Reading, and as to the conduct of the several parties to the transaction. In their special verdict the findings of the jury were that the ticket read from Topeka to Emporia, and that the conductor used no more violence towards Long than was necessary to eject him from the train. The verdict was for \$675.60, as follows: \$25 for injury to plaintiff's feelings; 60 cents for pecuniary loss; \$475 for exemplary or vindictive damages; \$25 for expenses; \$150 for attorney's fees. The plaintiff remitted the \$25 for expenses and the judgment against the company was rendered for \$650.60. To hold that the first count is an action *ex contractu* is to construe this language to declare in effect that the railroad company demanded of Long an additional amount of fare under an implied contract that it would pay it back again. This is not the correct construction to give to the language used. It clearly charges an action *ex delicto*. The second count demands compensation for the wrongs committed upon Long and not upon an implied promise to repay the sixty cents, and is an action *ex delicto*. Other errors are based upon the theory that the ticket which Long received and presented to the collector was from Topeka to Reading. The first answer to this contention is that the court instructed the jury that "if plaintiff did not have a ticket entitling him to passage beyond Reading, he, of course, cannot recover, and your verdict should be for defendant." The second answer is that the jury specially found that the ticket was from Topeka to Emporia. The instructions refused, which were predicated upon the theory that the ticket was from Topeka to Reading, could not aid the jury when they find that the ticket was, in fact, from Topeka to Emporia. *Woodman v. Davis*, 32 Kan. 344, 4 Pac. 262; *Railroad Co. v. Bennett*, 35 Kan. p. 399, 11 Pac. 155.

The attorneys for the plaintiff in error contend that there was no evidence of gross negligence, wantonness, or a wilful disregard of the rights of Long by the agents of the railroad company, and that there was nothing upon which to base exemplary damages. The forcible eviction of Long from the car in which he had a right to remain is certainly a wrong which is accompanied with great injustice

and outrage; but to make such eviction at about two o'clock in the morning, when the weather was cold and stormy, at a place on the prairie with no human habitation in sight, is at least such a reckless indifference to the rights of Long, and such an utter disregard of consequences to his life and health as would justify the jury in finding that the agents of the railroad company were grossly and wantonly negligent of his rights and welfare.

Judgment affirmed.

Opinion by DENNISON, P. J.

ROUSE v. DOWNS.

Court of Appeals, Kansas, Southern Dept., March, 1897.

PLEADING—SURPLUSAGE.—Where a petition contains unnecessary allegations and phrases which are treated in the trial of the case as surplusage; where there is no claim that the defendant is misled thereby; where no evidence is admitted to sustain them; where no instructions are based thereon; where they are not considered by the jury, and they furnish no basis for the judgment,—*held*, that no prejudicial error was committed in overruling the motion to make more definite and certain.

SAME.—Where the petition in an action in which exemplary damages are recoverable charges negligence, and the qualifying adjectives "gross, wanton and criminal" are used to qualify the word "negligence," these words were properly treated as surplusage, and the petition states a cause of action.

INSTRUCTION.—Where the jury finds the plaintiff entitled to only those items which are allowed him under the law, the defendant cannot complain because the court refuses to instruct the jury that they cannot find any other items.

SAME.—In the giving of instructions the court can state the law in its own language.

SAME.—It is not error to refuse to give an instruction when the jury find against the theory upon which it is predicated.

FELLOW-SERVANTS—RAILROADS.—Where a switch is constructed under the supervision and control of a division roadmaster in the line of his duty, such roadmaster is the representative of the railway company; and where the issue is as to whether it is properly constructed, the court does not err in refusing to instruct the jury that if the switch was constructed by the section men and work gang, said employees would be co-employees of a deceased fireman, and for any negligence of such co-employees the company would not be liable.

FROM a judgment of District Court, Neosho County, in favor of plaintiff, defendant brings error.

T. N. SEDGWICK, for plaintiff in error.

C. A. Cox and J. L. DENNISON, for defendant in error.

This was an action by plaintiff against the receiver of the Missouri, Kansas & Topeka Railway Company, as defendant, to recover the damages sustained by reason of the death of her minor son, Major W. Downs, who was killed in a railroad wreck, while acting in the capacity of fireman in the employ of said receiver. On the 24th of May, 1890, the employees of the receiver had put in a switch and switch connections at a small station on the line of the road known as "Bangor." At about three o'clock of the morning of the 25th the train upon which Downs was fireman came down over this switch, and the engine jumped the track at or about this switch connection, resulting in a disastrous wreck, and the engineer and Fireman Downs were so badly injured that they died shortly afterwards.

The plaintiff below introduced evidence tending to prove that the switch and the connection were constructed under the supervision of the division roadmaster, and that the rails constituting the switch proper were not in alignment with the rails of the main track, and that by reason thereof a portion of the switch rail extended past the main line rail so as to leave what is called in railroad parlance a "lip;" that the flange of the engine trucks struck the end of the rail and climbed upon the top of the rail and ran off, thereby causing the wreck. The special findings of the jury supported the contention of the plaintiff.

The syllabus made by the court states the points passed upon.

Judgment affirmed.

Opinion by DENNISON, J.

LOUISVILLE & NASHVILLE RAILROAD COMPANY v. BOWEN.

Court of Appeals, Kentucky, February, 1897.

STATUTE OF LIMITATIONS—ERROR IN SUMMONS.—In an action against a railroad company where a petition was filed and a summons issued in the wrong name was thereafter quashed, and another summons issued in the plaintiff's right name, the statute of limitations in the charter of the defendant, that such an action had to be brought within six months, will not avail, though the second summons was issued after the six months had expired.

COLLISION WITH HORSE AT CROSSING — EVIDENCE.—In an action for killing a horse at a railroad crossing, evidence that, after the accident, sign posts had been put up at the crossing and whistles blown for it was improperly admitted.

EVIDENCE.—Evidence of a witness as to the duty of an engineer at the time of the accident was improperly admitted.

APPEAL from judgment, Circuit Court, Hardin County, in favor of plaintiff.

W. H. MARRIOTT, for appellant.

SPRIGG & CHELF, for appellee.

This action was brought by the appellee to recover the value of a horse which he claims was killed by one of appellant's trains by the negligence of its agents and servants on May 24, 1893. The petition was filed October 23, 1893, and summons issued thereon on the day of filing, but in the name of D. C. Brown, as plaintiff, which was served on defendant. The return of this summons was, on motion of plaintiff, quashed, and on the 6th day of January, 1894, another summons was issued giving the name of the plaintiff as D. C. Bowen. This summons was served on the defendant on the 6th day of March, 1894. At the trial the jury reported a verdict in favor of appellee for \$125, and from the judgment entered thereon this appeal is prosecuted. The appellant insists that one of the provisions of its charter is that actions of this character must be instituted within six months. We are of the opinion that in this case the plaintiff had filed his petition setting out a cause of action, and had caused summons to issue thereon in time, and that he had done all the law required of him. It was the duty of the clerk to issue summons in accordance with law, and it was not incumbent upon the plaintiff to show that he had issued it.

Upon the trial we think it was error on the part of the court to permit witnesses for appellee to testify that signboards had been put up at the crossing, and that all trains had blown for this crossing since the date of the accident. Nor was the testimony of Williams in this case, in so far as he expressed an opinion as to what would have been proper for the engineer to have done under the circumstances, competent evidence. The appellant was under no obligation to blow its whistle or to ring its bell as a warning to a horse which stood eighteen feet from the track on the right of way with its head turned in the opposite direction from the track, and not upon a crossing or a roadbed of the defendant. The engineer testified that he did not see the horse until just about the time it was struck by the locomotive. The fireman testified that he saw the horse before it was struck; that it was standing over by the fence

eating grass about sixty yards from the engine; that it whirled around, made a couple of jumps, and jumped on the track just as the train arrived at that point. The engineer also testified that he blew the whistle for the crossing, and that he rang the bell as he approached it. It seems to us, from the facts as proven, that the appellant did all the law imposed upon it; that no amount of care or prudence could have prevented the accident, and that the employees of appellant were not guilty of any actionable negligence.

Judgment reversed.

Opinion by BURNAM, J.

LOUISVILLE AND NASHVILLE RAILROAD COMPANY v. BRAYMER.

Court of Appeals, Kentucky, February, 1897.

COLLISION—EVIDENCE AS TO INJURIES.—In an action for injuries sustained by plaintiff, in a collision, while a passenger in defendant's train, his testimony that a tumor that he exhibited on his stomach, was produced by the accident, was sufficient to sustain a verdict for him, notwithstanding two physicians testified that it had not been caused by a recent injury.

APPEAL from judgment, Circuit Court, Laurel County, in favor of plaintiff.

BOYD & CRAFT and J. W. ALCORN, for appellant.

The appellee was a passenger on the regular passenger train of the appellant when it collided with one of appellant's freight trains near Hazel Patch, which resulted as appellee claims from the gross negligence of the agents and servants in charge of the trains. He claimed to have been internally injured, and testified that he had not recovered from his injuries; that his stomach was still swollen, and he exhibited a tumor thereon which he claimed was produced by the accident. Some expert testimony was offered that tended to show that the tumor might have existed before the accident, and that it was not caused by the recent injury. The jury heard the testimony of the two gentlemen learned in the medical profession. They also heard the testimony of the appellee, and, if they believed him a credible witness, his evidence that the tumor did not exist before the accident was probably of more weight than the testimony of a multitude of surgeons who testified that it was not of recent date. It is urged that the jury did not believe the testimony of the

appellee, and that the jury was influenced by prejudice, because the verdict was only for \$250. The jury must have believed his testimony or they would not have found a verdict for him.

Judgment affirmed.

Opinion by PAYNTER, J.

HEWITT V. TAUNTON STREET RAILWAY COMPANY.

Supreme Judicial Court, Massachusetts, February, 1897.

CHILD RUN OVER BY STREET CAR—CARE OF PARENTS.—Whether due care was exercised by the parents of a child four years of age, who was allowed to play in the yard from which he escaped through a gate into the street, and was killed by a street car, was a question for the jury.

EVIDENCE.—Testimony of the father that he considered his boy to be of average intelligence was properly admitted.

DISCHARGE OF EMPLOYEE AFTER ACCIDENT.—The virtual discharge of an employee by a street car company after an accident cannot be shown as an implied admission by the company that the employee had been careless or incompetent.

EXCEPTIONS from Superior Court, Bristol County. Verdict for plaintiff as administrator.

L. E. WHITE, for plaintiff.

S. M. THOMAS, for defendant.

ALLEN, J.—1. In respect to the question whether there was sufficient evidence that due care was exercised by the parents of the child, the present case falls within the reason of those recent cases in which it was held that the question was for the jury (*Powers v. Railway Co.*, 163 Mass. 5, 39 N. E. 345, and cases there cited); and it is to be distinguished from *Casey v. Smith*, 152 Mass. 294, 25 N. E. 734, where virtually the child was sent to play upon the street.

2. The question to the child's father whether he considered his boy to be of average intelligence, of ordinary capacity, was not a question as to his sanity or insanity, but of his comparative brightness. It does not need an expert to testify on this subject, and the evidence was rightly admitted. *Laplane v. Cotton Mills*, 165 Mass. 487, 43 N. E. 294.

3. The plaintiff had introduced some evidence tending to show negligence or carelessness on the part of the defendant in operating its street railway, and unfitness or gross negligence or carelessness

of the defendant's servants in managing the car, and thus to bring his case within the provisions of St. 1886, c. 140. It was not in dispute that the regular motorman, Smith, was instructing Carroll, who had been running on the car with Smith for two or three days, and who at the time of the accident was alone handling the brakes and the power. The two grounds upon which the plaintiff relied were that Carroll was an incompetent man in the position which he occupied, and that there was gross negligence on the part of Carroll and Smith in the operation of the car. Carroll was a witness for the defendant, and on his cross-examination the following question and answer were admitted, under exception: "Q. Have you had any car to run since this accident? A. No car to run steady." There was also some evidence respecting Carroll's pay. In respect to this evidence, the court instructed the jury as follows: "That was admitted as bearing upon the question merely of the light in which Carroll was viewed by the defendant company itself." And again: "It is to be considered only as tending to show, if it has such tendency, in what light Carroll was viewed with reference to competency and fitness by the company itself." The admission of this evidence for the purpose stated presents the question whether the virtual discharge of a servant from his regular employment after an accident can be proved, in a case like this, as an implied admission of his employer that he had been careless or was incompetent. The plaintiff contends that this evidence bore directly on the defendant's negligence or carelessness in employing such a person. It has heretofore been held that taking additional precautions, after an accident, to prevent other accidents, is not admissible in evidence in a case like this, for the purpose of showing negligence. *Shinners v. Proprietors*, 154 Mass. 168, 28 N. E. 10; *Downey v. Sawyer*, 157 Mass. 418; 32 N. E. 654; *Railroad Co. v. Hawthorne*, 144 U. S. 202, 12 Sup. Ct. 591. The same reasons which led to those decisions apply in the present case. To hold otherwise would tend to discourage the adoption of additional safeguards, by improving the quality and raising the standard of the service. The admission of this evidence for the purpose stated may have prejudiced the defendant's case in the mind of jury. Exceptions sustained.

KENNESON v. WEST END STREET RAILWAY COMPANY.

Supreme Judicial Court, Massachusetts, February, 1897.

MASTER AND SERVANT — INJURED BY TROLLEY CAR.—Where a motor-man was killed by a trolley car running over him as he was adjusting the fender, and there was no evidence as to what caused the car to start, the company was not liable.

EXCEPTIONS from Superior Court, Suffolk County. Judge directed verdict for defendant.

J. D. LONG and J. A. GEOUGH, for plaintiff.

WILLIAM B. SPROUT, for defendant.

HOLMES, J.—This is an action for running over the plaintiff's intestate with an electric car on which he was employed as motor-man. The car had reached its destination, Somerville. The conductor went to the Somerville end, shifted the trolley, and pushed in the fender. The deceased took off the motor handles and gong tapper, went to the other end, which now would be the front of the car, and was seen to stoop down, and to take hold of the fender. Very shortly afterwards the car started, and he was caught under the wheels, and fatally injured. What caused the car to start is wholly uncertain. See *Ross v. Cordage Co.*, 164 Mass. 257, 41 N. E. 284. It is suggested that the car was defective, but there is no satisfactory evidence that it was, or, if it was, that the defect was or ought to have been known to the defendant, or that it was of such a nature as to be likely to cause the start. It is equally or more likely that the car moved after the trolley was turned and readjusted, because the electricity had not been fully shut off, or because the deceased in some way moved the cable under the car which let on the power. The presiding judge was right in taking the case from the jury.

The examination of the conductor as to his competency to say what a trouble with the electric handles indicated is not reported. We cannot revise the judge's finding that the witness was not qualified to express an opinion. *Com. v. Sturtivant*, 117 Mass. 122, 137. Exceptions overruled.

SAMUELIAN v. AMERICAN TOOL AND MACHINE COMPANY.

Supreme Judicial Court, Massachusetts, February, 1897.

MASTER AND SERVANT.—Where plaintiff was injured through the alleged negligence of employee of the defendant, who had sent the employee to repair machinery in the shop of plaintiff's employer, who had full control and direction of defendant's employee, the latter for the time was the servant of plaintiff's employer, and defendant was not liable.

EXCEPTIONS from Superior Court, Suffolk County.

A machinist named Guell, who was in the general employ of the defendant, was sent by it to the Collins Press Corporation, at its request, to repair a press, and while making the repairs the plaintiff, an employee of the press company, was injured through the alleged negligence of Guell. There was a verdict for defendant.

ANSON M. LYMAN, for plaintiff.

GEORGE E. SMOTH and WILLIAM F. GARCELON, for defendant.

KNOWLTON, J.—The only ground on which the plaintiff seeks to hold the defendant liable is that Guell was engaged as a servant of the defendant in the work in which he is alleged to have been negligent. The burden of proof was on the plaintiff to show this. There was no evidence to sustain this burden. Upon the undisputed testimony, Guell was repairing machinery of the Collins Press Company, and the defendant had no other connection with the business than to send him to do, in the service of his corporation, under the direction of its agents, whatever they wanted him to do in repairing the machinery. There was no evidence that tended to contradict the testimony that, while he was engaged in this service, he was under the control of these agents, who could at any moment tell him to stop or go forward with the work, and could insist that it should be done in one way or another, as they should think best. The fact that they relied largely upon his skill and experience did not affect their absolute right to control him in everything he did upon their machinery. He was, therefore, for the time, the servant of the Collins Press Company, and not of the defendant.

The law in cases of this kind has often been considered by this court, and is well settled. In *Ward v. Fibre Co.*, 154 Mass. 419, 28 N. E. 299, is this language: "The defendant corporation contends that although he was in the general service of Manchester and Ward,

and received his pay from them, he consented that they should set him at the defendant's work, to be paid for by the defendant according to the time spent upon it, and to be done according to specifications prepared by the defendant's superintendent, and to be managed and directed by the superintendent during its progress. If this were so, he would be the defendant's servant in the particular business, notwithstanding that in a general sense he was a servant of Manchester and Ward." In *Coughlin v. City of Cambridge*, 166 Mass. 277, 44 N. E. 219, the court says: "It is well settled that one who is a general servant of another may be loaned or hired by his master to another for some special service, so as to become, as to that service, the servant of such third party. The test is whether, in the particular service which he is engaged to perform, he continues liable to the direction and control of his master, or becomes subject to that of the party to whom he is lent or hired." *Hasty v. Sears*, 157 Mass. 123, 31 N. E. 759, is a case very similar to the one at bar. See, also, *Kimball v. Cushman*, 103 Mass. 194; *Johnson v. City of Boston*, 118 Mass. 114; *Morgan v. Smith*, 159 Mass. 570, 35 N. E. 101. Exceptions overruled.

SAUNDERS v. CITY OF BOSTON.

Supreme Judicial Court, Massachusetts, February, 1897.

DEFECTIVE SIDEWALK — NOTICE TO CITY. — A woman who sprained her ankle on a defective sidewalk and was unable to walk for several weeks is not excused from giving the ten days' notice required by Pub. St. ch. 52, sec. 19, as amended by St. 1894, by reason of mental or physical incapacity within section 21, where it appeared that she was able to tell her husband of the accident on the night of its occurrence, and the doctor on his first visit to her.

EXCEPTIONS from Superior Court, Suffolk County.

Plaintiff failed to give the statutory notice of the accident, and introduced evidence for the purpose of showing incapacity which the court held to be insufficient.

HESSELTINE & HESSELTINE, for plaintiff.

SAMUEL H. HUDSON, for defendant.

KNOWLTON, J. — The plaintiff cannot recover without showing that a notice of the time, place, and cause of the accident was given to the city in accordance with the requirements of Pub. St. ch. 52, sec. 19, as amended by St. 1894, ch. 422. She did not give a notice

within ten days, as required by the statute, and the only question in the case is whether there was evidence that from physical or mental incapacity it was impossible for her to give one within that time. If the jury could properly find that it was impossible, her later notice might have been found sufficient under Pub. St. ch. 52, sec. 21; otherwise she must fail in her action. It has repeatedly been held that a plaintiff cannot take advantage of this last provision of the statute if his physical and mental capacity would enable him to procure another person to give the notice in his behalf, even though he could not give it personally. *May v. City of Boston*, 150 Mass. 517, 23 N. E. 220; *Mitchell v. City of Worcester*, 129 Mass. 525; *McNulty v. City of Cambridge*, 130 Mass. 275; *Lyons v. City of Cambridge*, 132 Mass. 534. The plaintiff's injury was a sprain of her ankle, which caused her great pain, and for two or three weeks made it impossible for her to step on her foot. She had two children, and her husband was a poor man, who depended on his daily earnings to support his family. But she was able to tell her husband the cause and place of the accident when he came home on the night when it happened, and he went that evening to look at the place. She also told the doctor about it when he first came to visit her. The evidence tends to show that she sent to a lawyer a week or ten days after the accident, and there is nothing to show that she could not have caused a notice to be given before the expiration of the ten days as well as afterwards. She fails to sustain the burden of proof that rests upon her. Exceptions overruled.

BARCLAY v. CITY OF BOSTON.

Supreme Judicial Court, Massachusetts, February, 1897.

MUNICIPAL CORPORATIONS—PERSON INJURED BY FALLING IN STREET—NOTICE TO CITY.—Where it appeared that a woman fell on the street and was so severely injured that she had to be taken to a hospital and that eleven days passed before her family could learn where she was, and that then she was suffering great pain and much of the time was delirious, and that before the accident she was living on terms of affection with her family, warrants the inference that all the time she was in the hospital she was physically and mentally incapacitated from directing such business as causing notice of her accident to be sent to the city within ten days, as required by Pub. St., ch. 52, sec. 21, to save a claim for damages (1).

1. See *Saunders v. City of Boston*, preceding case reported.

EXCEPTIONS from Superior Court, Suffolk County. Judgment was given for defendant in action for damages for death of plaintiff's intestate.

HESELTIME & HESSELTIME, for plaintiff.

SAMUEL H. HUDSON, for defendant.

The question in this case is whether there was any evidence that by reason of physical or mental incapacity it was impossible for the plaintiff's intestate to give notice of the time, place and cause of the accident within ten days after it happened. See Pub. St. ch. 52, sec. 21. It is not sufficient to show that the injured person was unable to give the notice in person, but that through physical or mental incapacity it was impossible for him to procure the notice to be given. *May v. City of Boston*, 150 Mass. 517, 23 N. E. 220; *Lyons v. City of Cambridge*, 132 Mass. 534.

In the present case the plaintiff did not introduce the best evidence upon the question whether her intestate was so incapacitated during the whole period of the ten days, and, from all the testimony, the court and jury must have been left in doubt in regard to it. But the question is not whether the best evidence was introduced, nor whether there was proof beyond a reasonable doubt, but whether there was any evidence from which it might fairly be inferred that she was incapacitated. It appears that the deceased was a strong, healthy woman, fifty-eight years of age, who lived in Somerville, and kept house for her son and daughter. She got dinner for her son on the 1st day of January, 1895, and he left her in the house, sewing, at about three o'clock in the afternoon. She then disappeared, and although her son, daughter, and brother, made inquiries for her at different times among her friends in Somerville and Boston, and at the police offices in both of these cities, and advertised in the "Boston Globe" in regard to her disappearance, none of them learned of her whereabouts until January 11th, when her brother, who lived in East Boston, received a postal card from the City Hospital, in Boston, dated January 11th, stating that his sister was at the hospital, dangerously ill. He immediately went to see her, and at different times from that time until her death, which occurred on January 15th, she was visited by him, her son and daughter, and also by two of her neighbors. The evidence tended to show that she was suffering great pain, and much of the time was delirious, but on one or more occasions recognized her brother and her daughter, and greeted them affectionately. It appeared that at about five o'clock on January 1st she fell on one of the public streets of Boston, and sustained a fracture of her left hip, and hit her head. She received medical treatment in a drug store, a policeman came,

an ambulance was called, and she was carried to the City Hospital. While at the drug store she was perfectly conscious, and gave her name. There was no direct evidence to her condition from that time until January 12th, but the testimony tended to show that before the accident she was living on terms of affection with her children and her brother, and that, if she had been able, she would have communicated with them, to relieve their probable anxiety on account of her sudden disappearance. From all the circumstances of the case, we think the court and jury might fairly have inferred that, all the time while she was in the hospital, she was physically and mentally incapacitated from directing such business as causing notice of her accident to be sent to the city. Testimony from those who knew her condition, might contradict or confirm such an inference; but, in the absence of such testimony, we are of opinion that the plaintiff, although having the burden of proof, properly might ask the jury to believe that it was impossible for her mother to give the notice while she was in the hospital. Exceptions sustained.

Opinion by KNOWLTON, J.

HOLBROOK v. ALDRICH, ET AL.

Supreme Judicial Court, Massachusetts, February, 1897.

INJURY TO CHILD IN SHOP.—Where it appeared that a child seven years of age went into a shop with her father, and while he was engaged in paying for some goods the child went to the coffee grinder near by, passed her hand into it and lost her fingers, the storekeeper was not liable.

EXCEPTIONS from Supreme Judicial Court, Suffolk County. The court directed a verdict for defendants.

JOHN R. THAYER and CHARLES G. CHICK, for plaintiff.

CHARLES THEODORE RUSSELL and DICKSON & KNOWLES, for defendants.

HOLMES, J.—This is an action for loss of the plaintiff's fingers, which were cut off by a coffee grinder in the defendant's shop. The plaintiff, a minor less than seven years old, entered the shop with her father, who was going to make a purchase. She intended to buy some candy, but in the first place accompanied her father to a part of the shop at some distance from the candy counter, and near to the coffee grinder. He let go her hand to get his money. She went over to the coffee grinder, put her hand up the spout out of which the ground coffee came, hoping to get some whole kernels,

and lost her fingers. The judge directed a verdict for the defendants, and the plaintiff excepted.

We are of opinion that the direction was right. If the decision were to be put on the narrowest possible ground, it might be said that at the moment of the accident the plaintiff was not within the scope of the defendants' implied invitation, and therefore was entitled to no protection against such possibilities of harm to herself. But, even if she had been buying coffee, we should regard the rule as the same. The defendants' invitation in that case would have bound them to due care for the safety of those walking in the neighborhood while simply moving about. But it would not have bound them to look out for or to prevent wrongful acts, on the ground that the acts, if done, might hurt the actor. Temptation is not always invitation. As the common law is understood by the most competent authorities, it does not excuse a trespass because there is a temptation to commit it, or hold property owners bound to contemplate the infraction of property rights because the temptation to untrained minds to infringe them might have been foreseen. *McEachern v. Railroad Co.*, 150 Mass. 515, 23 N. E. 231; *Daniels v. Railroad Co.*, 154 Mass. 349, 28 N. E. 283; *Gay v. Railroad Co.*, 159 Mass. 238, 34 N. E. 186. The case is similar in principle to *McGuinness v. Butler*, 159 Mass. 233, 34 N. E. 259, and to *Mangan v. Atterton, L. R.*, 1 Exch. 239 (1), which, notwithstanding the observations in *Clark v. Chambers*, 3 Q. B. Div. 327, has been cited in this commonwealth repeatedly as unquestioned law. See, also, *Hughes v. Macfie*, 2 Hurl. & C. 744 (2). In *Moynihan v. Whidden*,

1. The facts in *Mangan v. Atterton*, 1 L. R. Exch. 239; 4 H. & C. 388; 35 L. J., Exch. 161; 14 L. T. (N. S.) 411; 14 W. R. 771, were as follows: The defendant exposed, in a public place, for sale, unfenced and without superintendence, a machine which might be set in motion by any passer-by, and which was dangerous when in motion. A boy four years old, by the direction of his brother, seven years old, placed his fingers within the machine, while another boy was turning the handle which moved it, and his fingers were crushed; *held*, that he could not maintain any action for the injury, as there was no negligence on defendant's part, the injury being caused by the act of the plaintiff and the boy who turned the handle of the machine.

2. The facts in *Hughes v. Macfie*, 2 H. & C. 744; 10 Jur. (N. S.) 682; 33 L. J., Exch. 177; 9 L. T. (N. S.) 513; 12 W. R. 315, were as follows: The defendants were owners of a warehouse, in front of which was a cellar, in a public street. The opening of the cellar was covered with a flap or lid, which the defendants raised and leant against a wall when they wanted access to the cellar. While it was leaning against the wall a young child, who had been warned not to meddle with it, climbed up upon it, and caused it to fall upon himself, and he was injured by the fall; *held*, that the defendants were not liable for the injury. The cellar lid also fell upon and injured another young child, but it was *held* that the defendants were not liable if he was a joint actor with

143 Mass. 287, 9 N. E. 645, which would have to yield to *McGuiness v. Butler* if there were a conflict, it seems to have been assumed that the plaintiff's touching the rope was not tortious. Exceptions overruled.

BRITTAIN v. WEST END STREET RAILWAY COMPANY.

Supreme Judicial Court, Massachusetts, February, 1897.

MASTER AND SERVANT—FELLOW-SERVANTS—EMPLOYERS' LIABILITY ACT.—Under St. 1887, ch. 270, § 1, cl. 2, making an employer liable for the negligence of a servant intrusted with and exercising superintendence, a street railway company is not liable for an injury to an employee in its paint shop who was assisting the paint shop superintendent in shifting cars, where the latter was acting as motorman and the employee as conductor, as they were then fellow-servants.

EXCEPTIONS from Superior Court, Suffolk County. The Court directed a verdict for defendant.

Action for tort under the employer's liability act (St. 1887, ch. 270) for personal injuries to plaintiff while in defendant's employ, due to alleged carelessness of the superintendent of the paint shop, where the plaintiff worked. The plaintiff and Mr. Hadley the superintendent, were engaged in switching a car onto the elevator in the paint shop and Mr. Hadley was on the car attending to the brake and reverser while the plaintiff was adjusting the trolley. The plaintiff testified that he received all his orders from Mr. Hadley, and he supposed Mr. Hadley directed all other employees in the paint shop, and there were thirty or forty men under him; that he had assisted Mr. Hadley many times in shifting cars; that Mr. Hadley told him to come and assist him in moving the cars as the company was in a hurry for them; that when the car was on the elevator he turned the trolley around to put it on the wire and that the car started in the direction he was standing, and he was injured; that Mr. Hadley was on the front end of the car acting as motorman, and the plaintiff handled the trolley rope acting as a conductor would act if in the street operating the car.

After the plaintiff rested his case defendant asked the court to

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| <p>the other child, but if he was not, then they were liable. <i>Held</i>, also, that contributory negligence, by an infant, has</p> | <p>the same effect, in disentitling him to maintain an action, as in the case of an adult.</p> |
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direct a verdict for defendant. Plaintiff's attorney asked to reopen the case and to place the plaintiff again on the stand upon the ground that the plaintiff's attorney had misunderstood an answer of plaintiff to a question. The request was refused, and plaintiff excepted.

P. B. RUNYAN, for plaintiff.

WILLIAM B. SPROUT, for defendant.

ALLEN, J.—According to the plaintiff's testimony, the accident happened in consequence of the starting of the car, and this, he contended, was in consequence of Hadley's negligence. Assuming this to be so, it is quite plain that Hadley was not exercising superintendence, but was merely acting as motorman, or as a fellow-servant of the plaintiff. There was no evidence tending to show that the plaintiff's injury was received by reason of the negligence of any person in the service of the employer, intrusted with and exercising superintendence, whose sole or principal duty was that of superintendence, as required by St. 1887, ch. 270, sec. 1, cl. 2. *Cashman v. Chase*, 156 Mass. 342, 31 N. E. 4; *Fitzgerald v. Railroad Co.*, 156 Mass. 293, 31 N. E. 7; *Adasken v. Gilbert*, 165 Mass. 443, 43 N. E. 199. It was within the discretion of the court to decline to reopen the case for further examination of the witness. The matter sought to be inquired about was immaterial upon the real question in the case. Exceptions overruled.

VINING v. NEW YORK AND NEW ENGLAND RAILROAD COMPANY.

Supreme Judicial Court, Massachusetts, February, 1897.

MASTER AND SERVANT—INJURY TO BRAKEMAN.—Where an experienced brakeman on a freight train, employed on the same road for a year and having a general familiarity with it, ascended in daylight, in the course of his usual employment, a ladder of a box car of ordinary width, and was injured by being struck by a similar car, that was standing on a spur track, used for storing cars, and he knew of the spur track and of its purpose and use, the company was not liable.

EXCEPTIONS from Superior Court, Suffolk County. Action in tort. Verdict for plaintiff.

While the plaintiff was climbing a ladder of a freight car in his capacity as brakeman, he was struck by a box car standing on the side track used for storing cars.

HELSELTINE & HELSELTINE, for plaintiff.

F. A. FARNHAM, for defendant.

ALLEN, J.—The present case is to be distinguished from those chiefly relied on by the plaintiff. In *Ferren v. Railroad*, 143 Mass. 197, 9 N. E. 608, the plaintiff was taken from his regular work, and was asked to help do something which was outside of the work which he was employed to do, and in an unusual place, and it was accordingly held that the danger to which he was exposed was something which he was not bound to anticipate or to look out for. In *Scanlon v. Railroad Co.*, 147 Mass. 484, 18 N. E. 209, a brakeman was hurt by coming in collision with a signal post by the side of the track. It was his first trip. He was unfamiliar with the road. He was not informed or cautioned as to the danger, and had no reason to suppose that there were permanent structures so near the track. On these grounds a distinction in his favor was made from *Lovejoy v. Railroad Corp.*, 125 Mass. 79, where the plaintiff was familiar with the road, and was held to have assumed the risk. The present plaintiff was in the course of his regular and usual employment. He knew of the existence of the spur track, and of its purposes and use. He was an experienced brakeman, and had been employed on the same road for a year, and had a general familiarity with it. The time of the accident was in daylight. The two cars in question did not differ, in width or otherwise, from ordinary box freight cars. The car on the spur track could have been seen, but the plaintiff testified that he did not think of looking. There was nothing unusual in the conditions existing at the time of the accident. Under these circumstances, if there had been no change in the position of either track since the plaintiff's employment, the defendant was not guilty of any breach of duty towards him. The case falls within the recent decisions of *Content v. Railroad*, 165 Mass. 267, 43 N. E. 94; *Thain v. Railroad Co.*, 161 Mass. 353, 37 N. E. 309; *Fisk v. Railroad Co.*, 158 Mass. 238, 33 N. E. 510; and *Lovejoy's Case*, already cited. Exceptions sustained.

WHITTAKER v. BENT.

Supreme Judicial Court, Massachusetts, February, 1897.

MASTER AND SERVANT—DEFECTIVE MACHINERY—FELLOW-SERVANT.—The temporary dampness of a mold into which an employee was pouring melted iron, whereby he was injured, was not a defective

condition of machinery within the statute, nor was the foundry superintendent who set up the mold acting otherwise than as a fellow-servant.

EXCEPTIONS from Superior Court, Suffolk County. The Court directed verdict for defendant.

C. E. WASHBURN, for plaintiff.

WIGGIN E. FERNALD and LONG & HEMINWAY, for defendant.

HOLMES, J.—This is an action for personal injuries caused by the explosion of some melted iron which the plaintiff was pouring into a mold in the defendant's foundry, where the plaintiff worked. The iron blew out because the mold was damp. The declaration contains three counts—one at common law, for defective machinery, and two on the statute, alleging defects in the condition of the ways, works and machinery, and negligence of a person exercising superintendence. The dampness of the molds could be ascertained only at the moment when they were set up. If they were damp, it was the duty of the man who set them up to have them dried at the forge, or to wipe them out with a rag, oil and blacklead them. The liability of the molds to be damp was well known. The cause of the dampness complained of is questionable, and not material. At the time of the accident the molds had been set up by a man whom we assume, for the purposes of decision, to have been a superintendent. According to the plaintiff's testimony, he asked this man if the molds were all right, and received the answer, "Yes; go ahead, Bob." The judge before whom the case was tried directed a verdict for the defendant.

We are of the opinion that the verdict was right. The temporary dampness of the molds was not a defective condition of the machinery, within the meaning of the statute or the rules of the common law. *Lynch v. Allyn*, 160 Mass. 248, 252, 253, 35 N. E. 550. There was no personal obligation on the part of the defendant to have the molds inspected for dampness. The molds were small and numerous, the danger transitory, and any further inspection than that necessarily left to the plaintiff's fellow-servants would have been impracticable. See *Garragan v. Iron-Works Co.*, 158 Mass. 596, 33 N. E. 652. The absolute obligation of an employer to see that due care is used to provide safe appliances for his workmen is not extended to all the passing risks which arise from short-lived causes. *McCann v. Kennedy*, 167 Mass. 23, 44 N. E. 1055. See, also, *Johnson v. Towboat Co.*, 135 Mass. 209; *Moynihan v. Hills Co.*, 146 Mass. 586, 592, 593, 16 N. E. 574. In a case like the present, where the danger is recurring, no doubt there may be a duty to give a general warning to look out for it. But that the plaintiff did not need. In setting up the mold, the superintendent was not exercising

superintendence. *Cashman v. Chase*, 156 Mass. 342, 31 N. E. 4. It is argued that, assuming this to be so, he did exercise it in what he said to the plaintiff, according to a distinction pointed out in *Kalleck v. Deering*, 161 Mass. 469, 470, 37 N. E. 450. See, also, *Wild v. Waygood* (1892), 1 Q. B. 783. But we think that the answer, "Yes, go ahead," was not the direction of a superior, but merely the assurance, in a customary colloquial form, of the fellow-workman, who had inspected the mold, that all was safe. A doubt might be raised as to the effect of a previous statement by the plaintiff that the foreman gave him a ladle of iron to pour, which looks at first like a direction to do what the foreman ought to have known to be dangerous; but it appears from the context that it means only that the foreman that morning was doing the manual work of filling the ladles, and handed one to the plaintiff. It was part of the plaintiff's regular business to pour.

Exceptions overruled.

DIPPER v. INHABITANTS OF MILFORD.

Supreme Judicial Court, Massachusetts, February, 1897.

FALLING ON ICY SIDEWALK. — It cannot be said as a matter of law that a person was negligent, who after she had passed over a portion of an icy sidewalk in safety, was in doubt whether to proceed or to go back and proceeded and was injured (1).

ACTION brought in Superior Court, Worcester County, by Susan E. Dipper, for personal injuries. Verdict for plaintiff, and case is reported for final determination.

HENRY E. FALES and STEPHEN H. TYNG, for plaintiff.

HERBERT PARKER, JESSE A. TAFT and CHARLES C. MILTON, for defendant.

LATHROP, J.— The only question raised by the report in this case is whether there was sufficient evidence of due care on the plaintiff's part to entitle her to go to the jury. We are of opinion that there was. From the evidence the jury could well have found that, although the plaintiff knew that there was ice on the sidewalk, she passed over it a distance of twenty feet before she reached the more dangerous place where she fell. When she reached this place, it

1. See *McPherson v. City of Buffalo* (N. Y.), 13 App. Div. 502, 1 Am. Neg. Rep. 490, *post*.

was a question whether to proceed, or to go back, or to attempt to cross the street. We cannot say, as matter of law, that the plaintiff was not in the exercise of due care in determining to go ahead. While it may be said to be negligence, as a matter of law, to step into an open trench, it is a matter of common knowledge that ice on a sidewalk often can be walked over with safety. It must be an exceptional case where an attempt to pass over such ice can be said to be negligent as a matter of law. The general rule in such a case is to leave the question of the plaintiff's care to the jury. *Dewire v. Bailey*, 131 Mass. 169, and cases cited. Judgment on the verdict.

BAHEL V. MANNING.

Supreme Court, Michigan, March, 1897.

POINTING FIREARMS SUPPOSED TO BE UNLOADED.—It is negligence *per se* for a person to point and snap a gun at another, under How. Ann. St. §§ 9110-9113, and it is no defense in an action for injuries received by the discharge of a gun so pointed that the defendant had satisfied himself that the gun was unloaded by using ordinary means to unload it.

CONTRIBUTORY NEGLIGENCE.—One is not guilty of contributory negligence in seating himself near a person who is repairing a gun, but out of the range of the gun, and is injured by the gun being pointed at him and then discharged.

SAME.—But he is guilty of contributory negligence if he sat in range of the gun and knew the repairer was about to snap it, and neither protested nor got out of the way and was injured by its discharge.

ERROR to Circuit Court, Saginaw County. Judgment for plaintiff. F. E. EMERICK, J. H. DAVITT, of counsel, for appellant. HUMPHREY & GRANT, for appellee.

This is an action on the case for damages for injuries caused by the defendant's carelessly and negligently discharging a gun, the bullet from which passed through plaintiff's right thigh and hip, permanently disabling him. It appears that the defendant at the time of the accident was a resident of Saginaw, this State, and had gone to Otsego lake on a hunting trip. He had formerly lived at that village for some years, and he and the plaintiff were well acquainted. On the evening of November 13, 1894, the plaintiff, learning that the defendant was at the hotel in the village, called to visit him. As the plaintiff entered the public room of the hotel, he found the defendant seated in front of a washing stand on the east side of the room, fixing his gun. He had taken the stock off and

the works out, and was fixing the spring, the barrel of the gun lying across his lap. The plaintiff became seated near the defendant, when some conversation was had between them in reference to the gun. During the day the defendant had loaded the gun,—that is, had put a number of loaded cartridges into the magazine,—but had had trouble with discharging some of them. The gun had twice failed to explode the cartridges during the day, and he took it back to the hotel with the cartridges in the magazine. He testifies that, before he commenced working on the gun to take it apart, he worked the lever which extracts the cartridges from the gun until it failed to throw out any more cartridges, and then took the gun apart, and it was in that condition when the plaintiff came in. The parties differ as to the position of the gun and the position occupied by each after the plaintiff came into the room.

The plaintiff testified that the gun was on the defendant's knees and was not pointed at him until the spring was fixed, and defendant brought it up to try it; that all the time he was in the room and up to the time when the gun was snapped off, he was not in range with the muzzle; that he did not think the gun was loaded.

The defendant testified that he thought the gun was not loaded; that nothing occurred to indicate that there was anything the matter with the magazine of the gun that night; the lever operated as usual; that he had no recollection of any change in the plaintiff's position or of his own after the plaintiff sat down there; that the gun pointed in his direction all the time from the time he sat down until it was discharged; that he did not pick it up, raise the hammer and bring it around towards the plaintiff and then pull it off. The defendant further testified that he supposed he had all the cartridges out of the gun and out of the magazine; that he pumped the lever probably five or six times; that this was the usual way of throwing out the cartridges. It was shown, however, by the testimony of other witnesses, that after the cartridge was carried from the magazine to the barrel by working the lever after the works had been put back into the gun, the cartridge would come into plain view of the one working the lever.

The court charged the jury that from some cause unexplained by the witnesses one cartridge was not removed and the result was this accident. The pointing of the gun under such circumstances at another is made an unlawful act by the statutes of this State. The fact that the defendant used the precautions he enumerated did not relieve him from liability. The act of pointing a gun at another, cocking it, and pulling the trigger, is of itself a negligent act. "I therefore charge you, gentlemen of the jury, that under the

undisputed evidence in this case, the act of the defendant in pointing the gun at the plaintiff, raising the hammer and pulling the trigger, which caused the gun to be discharged and to injure the plaintiff, was a negligent act on the part of the defendant, and rendered him liable to the plaintiff in this action, and your verdict must be in his favor, unless you find that the plaintiff himself was guilty of contributory negligence."

The sections of the statute referred to by the court in its charge are 9110-9113, inclusive, of Howell's Annotated Statutes. The act was passed in 1869, and is entitled, "An act to prevent the careless use of firearms." In *People v. Chappell*, 27 Mich. 486, this statute was under consideration and it was held that a prosecution would not lie and a conviction would not be sustained under it where the use of firearms was not careless or was intentional or malicious. "The absence of malice is as necessary an ingredient in the statutory definition as the use of firearms. And the offense is purely statutory." The general rule, and without reference to this statute, is that a very high degree of care is required from all persons using firearms in the immediate vicinity of others, no matter how lawful or even necessary such use may be (1). It is apparent from the defendant's own testimony that he was responsible for the cartridges having been left in the gun. Had he examined the gun he would of necessity have seen the cartridge there, as it was shown that it would have been in plain view when pulling the lever. He

1. The court cited *Morgan v. Cox*, 22 Mo. 372, where it was held where injury to another is caused by an act that would have amounted to trespass *vi et armis* under the old system of actions, it is no defense that the act occurred through inadvertence or without the wrongdoers intending it. *Castle v. Duryee*, 2 Keyes (N. Y.) 173. "It is not the law if one supposing a musket to be unloaded or to be charged only with powder snaps it at another and he is wounded, he is irresponsible in a civil action." *Judd v. Ballard*, 66 Vt. 668; where it appeared that the plaintiff was injured by the discharge of a revolver in the hands of the defendant while the two were facing each other lying in the bottom of an express wagon. The defendant had discharged one of the barrels for amusement, and was fixing the hammer

preparatory to returning the revolver to his pocket, when the discharge which injured the plaintiff occurred. It was said by the court that "upon the facts presented the defendant was clearly answerable for the damages; the test of the liability is not whether the injury was accidentally inflicted, but whether the defendant was free from blame"—citing *Vincent v. Stinehour*, 7 Vt. 62; *Morris v. Platt*, 32 Conn. 75; *Bullock v. Babcock*, 3 Wend. 391. See *Leame v. Bray*, 3 East, 593, *Welch v. Durand*, 36 Conn. 182; *Howard v. Tyler*, 46 Vt. 683. In *Tally v. Ayres*, 3 Sneed, 677, it was said: To constitute an available defense in such cases, it must appear that the injury was unavoidable or the result of some superior agency, without the imputation of any degree of fault to the defendant.

testified the gun was pointing at the plaintiff all the time he was fixing it, and that it was in the same direction when he snapped it off. It was a plain violation of the statute, and this violation of statutory duty is negligence *per se*, but aside from this, we think the defendant was guilty of negligence and was liable in a common-law action. The question of plaintiff's contributory negligence was fully and fairly submitted to the jury. The court charged that the claim of the plaintiff was that he took his seat a short distance from the defendant, but out of the range of the gun as the defendant was then handling it; that after the defendant had repaired the lock and put it together again, that he took this gun up after some remarks, and shifted its position so that it then was pointing towards him and snapped the gun; that he had no opportunity to protest or get out of the way. "If you find that this occurred as claimed by the plaintiff, then he was not guilty of contributory negligence. If you find that the defendant's version is true, if you find that during the twenty minutes or so that the plaintiff sat by the defendant before the accident, and while the defendant was repairing the gun, the plaintiff sat in range of the gun, or so nearly so that a slight movement of it might bring him within range, and if while sitting there he knew the defendant was about to snap the gun to try the lock, and had time to protest or get out of the way, and did neither, or if you find that the plaintiff invited the defendant to try it or snap it, meaning thereby to allow the hammer to strike so as to discharge the cartridge, if one happened to be in the gun, then the plaintiff was guilty of contributory negligence."

We hold that the court was correct in charging the jury, as matter of law, that the defendant was guilty of negligence.

Judgment affirmed.

Opinion by LONG, C. J.

OSTRANDER V. CITY OF LANSING.

Supreme Court, Michigan, March, 1897.

MUNICIPAL CORPORATIONS — CONSTRUCTION OF SEWER. — The construction of a sewer by a city is a private municipal enterprise for the negligent control of which it is liable under a power in the charter allowing compensation for its use.

WORKMAN INJURED BY SIDES OF EXCAVATION CAVING IN. —

Where a workman was injured by the caving in of the sides of an excavation for a sewer, it was a question for the jury whether the workman knew

or ought to have known that an excavation had been made in adjacent ground, several years before, for the laying of water mains, thereby increasing the danger of the caving in of the sides of the excavation.

JURY - COMPROMISE VERDICT. — Where the jury announced that they had agreed upon a compromise verdict, if it would be received, and upon being polled, one of the jurors responded, "compromise verdict," the verdict should not have been received.

ERROR to Circuit Court, Ingham County. Judgment for plaintiff.

CLARK C. WOOD, BLACK & DODGE, of counsel, for appellant.

CAHILL & OSTRANDER, for appellee.

The plaintiff recovered a judgment of \$2,500 for injuries received while in the employ of defendant in constructing a sewer in the year 1892. The injury occurred from the caving in of the earth on one side of the excavation, and there seems to be no dispute that this might have been avoided by properly shoring up the sides, which it was customary to do. But on this occasion there was not sufficient lumber there for the purpose, and but a single board was placed on either side of the excavation, about one foot below the surface, with a prop between. When the plaintiff had reached a depth of from five to six feet, as shown by his testimony, the earth slid in from near the bottom of the ditch, where he was at work, and buried him to his thighs. It was averred in the declaration that in 1889 the defendant had caused to be built and constructed, at a point some two or three feet south of the sewer, a ditch, in which were laid water mains, so called, which pipes were laid of a depth of five feet below the surface, by reason of which the earth around and about such water main, having been once thrown out, and replaced afterwards, was, at the time of the injury to the plaintiff, in 1892, liable and likely to cave and fall into the said sewer ditch, rendering it dangerous and unsafe to dig near to and below said water pipe any ditch or opening in the earth. And the declaration avers that the duty of the city was, by employing sufficient lumber, boards, and pieces of timber, to have stayed and supported the walls, so that the earth could not cave and fall into the ditch. The effect of the charge of the circuit judge was that the plaintiff assumed the ordinary risk of working in a trench of the kind which this one appeared to him to be; that, if he knew of the existence of a water main in proximity to the trench, or if, in the exercise of ordinary care and prudence, he ought to have known of it, he could not recover. But the court left it for the jury to determine whether plaintiff did know or should have known of the proximity of this water main, and whether the defendant exercised ordinary prudence in guarding against the results of the proximity of the water main. Three principal points

are discussed in the brief of counsel for the defendant: First, it is contended that the construction of the sewer was the exercise of a governmental function, and that the city is, therefore, not liable; second, it is contended that the plaintiff assumed the risk of the employment in any event; and, third, that the verdict given in the case is not a lawful verdict.

We think the claim that the city was in the exercise of a governmental function instead of a private municipal enterprise is ruled by the case of *City of Detroit v. Corey*, 9 Mich. 165. The charter of the city of Lansing contains the following provision: "The council may charge and collect annually from persons whose premises are connected by private drains with the public sewers, such reasonable sum not exceeding two dollars per year, as they may deem just, in proportion to the amount of drainage through such private drain." It was said of a similar power in *City of Detroit v. Corey*: "The sewers of the city, like its works for supplying the city with water, are the private property of the city; they belong to the city." See, also, *Barron v. City of Detroit*, 94 Mich. 601, 54 N. W. 273; *Baker v. City of Grand Rapids (Mich.)* 69 N. W. 740 (1).

The plaintiff must be held to have known that there was greater or less danger of the soil caving in, and this risk he assumed. But was he bound to know that peculiar conditions existed which rendered the soil at this place peculiarly liable to cave in? If he knew or reasonably ought to have known of the danger, he should be held to have assumed the risk. On the other hand, where there is any doubt whether the employee was acquainted or ought to have been acquainted with the risk, the determination of the question is necessarily for the jury. *Rummell v. Dilworth*, 111 Pa. St. 343, 2 Atl. 355. It cannot be said in this case that the proximity of the water mains did not add to the risk, nor does it appear that the plaintiff knew of this proximity, and we think, under the circumstances, that it was properly left to the jury to determine the two questions submitted to them, namely, whether the plaintiff knew or ought to have known of the existence of the water main; and, second, whether the city was negligent in failing to guard against the injury. In *Breen v. Field*, 157 Mass. 277, 31 N. E. 1075, the plaintiff was injured while digging a trench near where a washout had occurred shortly before, unknown to the plaintiff. The court said: "It cannot be said that the plaintiff assumed the risk when he was ignorant of facts on which, perhaps, a proper appreciation of the risk depended. Whether he was or was not ignorant of them or whether he could have failed in due care to

1. *Baker v. City of Grand Rapids (Mich.)*, is reported in 1 Am. Neg. Rep. 90, *ante*.

observe the condition of the side of the trench were questions for the jury." See, also, *Parkhurst v. Johnson*, 50 Mich. 70, 15 N. W. 107; *Railroad Co. v. Ward*, 90 Va. 687, 19 S. E. 849.

The record shows that after the jury had been out all night the foreman said to the court that they had arrived at a compromise verdict; that they had agreed to do certain things provided it could be given as a compromise verdict, and the court would accept it; the court accepted it, and the jury was polled, each juror responded "yes" as his name was called, except one who responded "compromise verdict." It never ought to be permitted that any member of the panel should shift his responsibility by placing it upon the ground that it is a compromise, and, in effect, implying that the result does not embody the results of his own investigation and best judgment. We think this verdict should not have been received. See *Rathbauer v. State*, 22 Wis. 468, where a juror said he had agreed for the sake of an agreement, not because he thought it correct.

Judgment reversed.

Opinion by MONTGOMERY, J.

WHORAM v. ARGENTINE TOWNSHIP.

Supreme Court, Michigan, March, 1897.

DEFECTIVE HIGHWAYS—DECLARATION.—In an action for injuries caused by a defective highway the declaration sufficiently describes the place of injury where it avers that the highway was situated between two specified sections in a township named and two specified sections in defendant township and being known as the "town line" road, and that while plaintiff was riding along said highway, between said sections, as above described, on horseback, his horse stepped into a hole on the north side and in the traveled part of said highway, between said sections (1).

CONTRIBUTORY NEGLIGENCE.—Where it was shown that the plaintiff knew of the defect several months before the accident, but he supposed it had been repaired, and without thinking of the defect rode his horse into it, the question of his negligence was for the jury.

CHARGE.—The error of the court, in charging that it was "the duty of the township to keep its public highways in reasonable repair and fit for public travel; and that duty not only extends to the traveled portion of the highway, but that portion within the main ditches of the same," was remedied by the further charge of the court.

1. See *Donohue v. Town of Warren* (Wis.), 1 Am. Neg. Rep. 533, *post*.

FROM a judgment of Circuit Court, Genesee County, in favor of plaintiff in action for personal injuries caused by a defective highway, defendant brings error.

The following is from the declaration: "And that heretofore, to wit, on the 29th day of January, A. D. 1893, the said township of Argentine, defendant herein, and for more than one year previous thereto, had charge and control of the highways in said township, and had charge and control of a certain portion of the highways situated between the township of Argentine, Genesee county, Michigan, being the highway between sections thirty-two and thirty-three of and in Gaines township, and sections four and five of and in the township of Argentine aforesaid, being what is known as a 'town line road' and that the portion of the road above described was and had been for many years, and is now, in and under the control, supervision and management entirely of the township of Argentine, and that the same had been set off by the proper officers of the said townships of Gaines and Argentine, to the township of Argentine, and they had assumed control of the same and the care and repair of the same, and that said highway was a public highway for the travel of passengers and people with conveyances over the same, and was a regular laid out highway and had been for the period of over ten years; and that upon said 29th day of January, 1893, the said plaintiff was riding along said highway between said sections as above described on horseback, and while using and exercising due care and caution without any neglect or fault upon his part, his horse stepped into a hole on the north side, and in the traveled portion of said highway, and between said sections above described." The said plaintiff was thrown and fractured his left leg. The hole in the highway was about eighteen inches deep and one foot across.

EVERETT L. BRAY, for appellant.

TINKER & FRACKELTON, for appellee.

MOORE, J. — The plaintiff sued the defendant and recovered a judgment for personal injuries received on a defective highway. Defendant appeals.

The first group of errors assigned relate to the declaration which defendant claims did not sufficiently describe the place of injury. The defendant pleaded the general issue. While the declaration might well have been more specific, we think it stated a cause of action, and alleged a substantial grievance, and under the plea interposed by the defendant is sufficient. *Jackson v. Collins*, 39 Mich. 557; *Briggs v. Milburn*, 40 Mich. 512; *Burke v. Wilber*, 42 Mich. 327, 3 N. W. 861; *Rowland v. Superintendents of Poor*, 49 Mich. 553, 14 N. W. 494; *Sutton v. Van Akin*, 51 Mich. 463, 16 N. W. 814;

Campbell *v.* City of Kalamazoo, 80 Mich. 655, 45 N. W. 652; Fuller *v.* Mayor, etc., 82 Mich. 481, 46 N. W. 721; Storrs *v.* City of Grand Rapids (Mich.) 68 N. W. 258; Moody *v.* Shelby Tp., Id., 259.

The testimony disclosed that in the fall before the accident the plaintiff knew of the defect in the highway, but that he supposed it had been remedied. He also testified: "After I got into the road, I started the mare into a trot, and was trotting when I got to this hole. I was thinking about my errand — about my business — when the accident happened. I didn't think about this hole. My mind was intent upon my business at the time. I was on the side of the road. I kept along in a straight line. I did not take any precaution to keep away from the hole. The road was slippery and icy,—the traveled part of the road,—so I kept to the right-hand side. I had continued from the time I started along the outside,—on the right-hand side of the traveled part of the track,—and was in that position when the accident happened." It is claimed that this testimony, taken in connection with his knowledge of the road, shows that the plaintiff was negligent, and the court should have so directed the jury. We think the case in this particular is governed by Bouga *v.* Weare Tp. (Mich.) 67 N. W. 557, and that the court did not err in submitting the question to the jury.

The other assignments of error necessary to be discussed relate to the charge of the court. In his charge he made use of this language: "It is the duty of the township to keep its public highways in reasonable repair, and fit for public travel; and that duty not only extends to the traveled portion of the highway, but that portion within the main ditches of the same." This is assigned as error. The last sentence was evidently a slip of the tongue of the learned judge, for he immediately added, "That is, all that portion of the highway worked, and which the public would naturally use by reason of its apparent fitness for use;" and a little later he stated the law to be: "It is not expected that public travel will occupy all parts of a country highway, and there is no requirement of law compelling public authorities to put such road in condition as if it were." He also charged the jury that under the law, to entitle the plaintiff to recover, he must show by a preponderance of evidence at least four things: "First, that the highway at the place where the injury was received was not in reasonable repair, and in a condition reasonably safe and fit for travel, and that the defect was the very one complained of in his declaration; second, that the township, by or through its supervisor or commissioner of highways or overseer of highways, had knowledge or notice, either actual or constructive, of the defect complained of, and that the township, by its officers, had

reasonable time and opportunity, after such knowledge or notice, to remedy the defect, and that the township did not use reasonable diligence therein after such knowledge or notice; third, that the injury was received by reason of the defect complained of, and that by reason thereof plaintiff has sustained damages; fourth, that the plaintiff was free from negligence himself, and that he was guilty of no negligence whatever which in any way contributed to the injury received." The jury were not misled by the charge.

We do not think any of the assignments of error can be sustained. Judgment affirmed. The other justices concurred.

KINGSTON v. FORT WAYNE AND ELMWOOD RAILWAY COMPANY.

Supreme Court, Michigan, March, 1897.

EVIDENCE OF PREVIOUS INTOXICATION.—Evidence that the plaintiff was in the habit of becoming intoxicated two or three years previously, is inadmissible as bearing upon the question of his intoxication at the time of the injury.

CREDIBILITY—EVIDENCE.—It is proper, on cross-examination, to inquire of the plaintiff as to his past life and associations, to affect his credibility as a witness, but defendant is bound thereby and cannot introduce direct testimony in relation thereto, as a collateral issue would then be raised.

INTOXICATION NOT NEGLIGENCE AS MATTER OF LAW—PUSHED OFF A STREET CAR.—Where the negligence charged was that the plaintiff was injured by being pushed from a street car by the conductor, it was error to charge that the plaintiff could not recover, if he was intoxicated at the time.

ERROR to Circuit Court, Wayne County. Judgment for defendant and plaintiff brings error.

MOORE & MOORE, for appellant.

CONELY & TAYLOR, for appellee.

The defendant, on October 10, 1891, owned and operated a horse railway in the city of Detroit. The plaintiff went upon one of its cars on that date for the purpose of being transported as a passenger. It was what was called a "summer car," open on both sides, with a step or running board, consisting of one board extending the length of the car. The plaintiff, being unable to secure a seat, stood on the running board and claims that the conductor in charge of the

car negligently pushed him off, causing the injury complained of. The defendant claims that the plaintiff was intoxicated and either jumped or fell off. Plaintiff denies the intoxication, and claims even if he were intoxicated he had a right to ride standing on the running board, and that if he was guilty of no neglect and was pushed off the car by the negligent conduct of the conductor, he was entitled to recover. Evidence was introduced on the part of the defendant, under objection by the plaintiff, that the plaintiff two or three years before was in the habit of becoming intoxicated, and that he had been discharged from a position because of his drinking habits, and that at one time he kept an improper hotel. We think it was proper examination to make inquiry as to plaintiff's condition at the time of the injury complained of, and that the defendant had a right to call witnesses to show that the plaintiff was intoxicated at that time, but the court was in error in permitting the defendant to introduce testimony showing that two or three or more years prior to that time the plaintiff was in the habit of becoming intoxicated. This evidence was undoubtedly prejudicial to the plaintiff's case. It was proper matter of cross-examination of plaintiff to inquire what his past life had been and what company he had kept in the past, as he was before the jury as a witness; but the defendant would be bound by his answers, as there is no rule which would permit the defendant to introduce direct testimony bearing upon those questions, thus raising a collateral issue. The general reputation of the plaintiff for truth and veracity was open to inquiry, but the attack upon his credibility which would raise a collateral issue was not open to the defense. *Williams v. Edmunds*, 75 Mich. 92, 42 N. W. 534; *Fahey v. Crotty*, 63 Mich. 383, 29 N. W. 876; *Pokriefka v. Mackurat*, 91 Mich. 399, 51 N. W. 1059. It is apparent, therefore, that the court was in error in permitting the testimony showing the reputation of plaintiff as a drinking man prior to the time of the injury, as well as in permitting the defendant to show by witnesses called by it, the character of the hotel which he kept.

The court charged the jury: "If you find that the time he was upon this place he was intoxicated, then he could not recover, because in the case of an intoxicated man the company was not expected, and the law would not require of this company, that it should guard an intoxicated man against injury standing in the place he was standing." This charge was erroneous. The question of his intoxication was a matter to be taken into consideration by the jury in determining whether or not the plaintiff was in the exercise of due care in standing upon the running board while he was in that intoxicated condition; but his condition would be no excuse to the

company if its conductor negligently and wrongfully pushed him off. This seems to be the general rule. *Stuart v. Machiasport*, 48 Me. 477; *Alger v. City of Lowell*, 3 Allen, 402.

Judgment reversed.

Opinion by LONG, C. J.

TAYLOR ET AL. V. GRAND AVENUE RAILWAY COMPANY ET AL.

Supreme Court, Missouri, Division No. 1, February, 1897.

COLLISION AT CROSSING BETWEEN STREET CARS — INSTRUCTION.—In an action for injuries to a passenger on an electric car, which collided with a cable car at a crossing, where a flagman employed by both companies was stationed, whose duty it was to direct the crossing of cars on each line by signals, a charge that if the flagman signaled the cable car forward it had the right to proceed, although the electric car should be seen by the gripman, and was then approaching the crossing, was error.

INSTRUCTION.—An instruction that exempted the cable car company from all liability, if the jury found that the motorman operating the electric car failed to exercise the care and caution on his part required by law, in approaching the crossing, was error.

APPEAL from Circuit Court, Jackson County.

KARNES, HOLMES & KRAUTHOFF, for appellant.

L. H. WATERS, for respondents.

This is an action by Augusta Taylor and her husband for damages for injuries resulting to the wife while a passenger upon one of the cars of the Northeast Street Railway Company of Kansas City. The defendants are the Grand Avenue Railway Company, that operates a cable, and the Northeast Railway Company, operated by electricity.

The plaintiff, Augusta Taylor, was a passenger on a west-bound car of the defendant the Northeast Railway Company, and was knocked to the floor of the car and injured by reason of the car in which she was riding colliding with and running against a north-bound car, running on the tracks of the Grand Avenue Company, at the intersection of Fifth and Walnut streets, where the two street car tracks cross each other. The case was tried by a jury, and resulted in a verdict in favor of the defendant the Grand Avenue Company, and against the defendant, the Northeast Railway Company. The plaintiffs and the Northeast Railway Company both moved for a new trial, and the trial court granted both motions for the

reason of error in instructions Nos. 1 and 6. From the order granting a new trial the Grand Avenue Company appeals.

The operator in charge of each car testified that he was given a signal by the flagman employed jointly by both companies at the junction where the defendants' tracks cross each other, to proceed on his way over the crossing with his car, while the flagman testified that he signaled alone the car of the Grand Avenue Company. Under this state of the testimony the following instructions, complained of by both plaintiff and the defendant the Northeast Railway Company, were given on behalf of the defendant the Grand Avenue Company: "1. If the jury believe from the evidence that at the crossing of Fifth and Walnut streets a flagman was stationed by the two defendants, and at the time of the accident complained of the flagman signaled the cable cars forward, then they had the right to proceed, although the electric car in which the plaintiff was a passenger could be seen by the gripman, and that it was then approaching the crossing and they had the right to assume that said electric car would stop so as to avoid a collision." "6. Although the jury may believe from the evidence that the flagman at the crossing of Fifth and Walnut streets was employed jointly by the two defendant companies, and although you may believe that he signaled the north and south-bound cars on Walnut street to proceed on their way across Fifth street, and at or about the same time signaled the motorman on the electric car to proceed on his way across Walnut street, and that in so doing said watchman failed to exercise ordinary care and caution, yet if you further believe from the evidence that the motorman operating the electric car saw the cable cars approaching the crossing, and that a collision was threatened, or by the exercise of the highest practicable care and caution could have seen this a sufficient time and distance to have stopped his car and prevented the collision, then it was his duty to have done so, notwithstanding the signal of the flagman; and, if he failed so to do, then his negligence was the proximate cause of the injuries, and no recovery can be had in this case against the cable company."

Both of these instructions were manifestly erroneous. Instruction No. 1, exempting the Grand Avenue Company on the sole ground that it was signaled to cross by the flagman, totally ignoring the question of its duty to exercise care and caution to avoid a threatened danger if it was seen, or if it could have been seen by exercising care and caution, was clearly misleading, and highly prejudicial. The law-making power of the State, and not the street car companies, can alone promulgate rules that must govern and define the company's obligation and liability to the citizen and their passengers.

Instruction No. 6 is also faulty in that it exempts the defendant cable car company from all liability if the jury should find from the testimony that the motorman operating the electric car failed to exercise the care and caution on his part required by law in approaching the crossing.

Affirmed.

Opinion by ROBINSON, J.

SANDERSON v. BILLINGS WATER-POWER COMPANY.

Supreme Court, Montana, February, 1897.

COLLISION WITH HEAP OF EARTH IN STREET.—Where the plaintiff was injured by being thrown, in the night-time, from his wagon that collided with a heap that the defendant left in the street without any light or protection, after taking the same from an excavation, the defendant was liable.

RECORD.—The instructions in a case were not a part of the judgment-roll, unless included in a bill of exceptions, before the Codes of 1895 went into effect.

APPEAL from judgment, District Court, Yellowstone County, in favor of plaintiff.

O. F. GODDARD, for appellant.

GIB S. LANE, for respondent.

This was an action for personal injuries. The pleadings consist of a complaint, answer and replication. A verdict and judgment was rendered for plaintiff for \$2,500. The defendant appealed from an order denying a motion for a new trial and from the judgment. After the filing of the transcript in this court, a motion was made by the respondent to strike out the statement on motion for a new trial, for the reason that the same was not served within the legal time required. The motion was granted, and the appeal from the order denying the motion for a new trial was dismissed at the same time. The case in this court is on appeal from the judgment alone. The complaint is as follows:

“That during all of the times hereinafter mentioned the defendant was, and still is, a corporation organized under the laws of the State of Montana. That the defendant, on the 21st day of June, 1894, by its agents and servants, wrongfully, carelessly, and negligently excavated a deep and dangerous excavation and trench in and

across the public street, road, and highway known as 'Twenty-Seventh Street North,' between First avenue north and Second avenue north, in the city of Billings, Yellowstone county, State of Montana, and said defendant, by its agents and servants, wrongfully, negligently, and carelessly thus obstructing said highway, negligently left a large pile of earth in said road, street and highway, and negligently suffered said pile of earth dug from said excavation and trench to remain therein and thereon, obstructing said highway, during the night-time of said day; and to remain therein and thereon openly exposed, and without any protection, fence, light, signal, or anything else to indicate danger, or give notice to travelers or passers along said highway against accidents. That by reason of said negligence, carelessness, and improper conduct of the defendant by its said agents and servants, in the night-time of the said day, while the plaintiff was lawfully traveling on said highway and street, the two-wheeled cart of the plaintiff therein being then and there driven by plaintiff with one horse drawing the same, then passing through said street and along and over said road, street, and highway, the plaintiff being then and there wholly unaware of danger, was, without fault or negligence on plaintiff's part, accidentally driven against the said pile of earth, and was thereby overturned, whereof the plaintiff received great bodily injury. That one of his ankles was dislocated and badly sprained, and he is, as he is informed and believes, permanently injured. Plaintiff was made sick, sore, and lame, was put to great pain, and was and is still prevented from going on with his occupation and business of farming; to his damage in the sum of five thousand dollars. Wherefore plaintiff demands judgment against the defendant for the sum of five thousand dollars and costs of this action."

Appellant insists that the complaint in this action does not state facts sufficient to constitute a cause of action, and hence does not support the judgment. His counsel suggests in support of this only ambiguities and uncertainties in the averments of the pleading. The record fails to disclose that a demurrer was interposed to the complaint on any ground whatsoever, and by answering appellant has waived the right to object to any such defects, if they exist. The complaint, in our opinion, states a cause of action.

We are also asked to examine certain instructions given by the lower court, which counsel for appellant claims are "inconsistent with, not justified by, and unsupported by the pleadings." At the time the judgment-roll in this case was made up, which was before the Codes of 1895 went into effect, the instructions in a case were not a part of the judgment-roll, unless included in a bill of exceptions.

See *Kleinschmidt v. McDermott*, 12 Mont. 315, 30 Pac. 393, and especially the concurring opinion written by Mr. Justice DeWitt. *Light Co. v. Morgan*, 13 Mont. 394, 34 Pac. 488, and *State v. Black*, 15 Mont. 143, 38 Pac. 674. The instructions in this case were never included in any bill of exceptions, and thereby made a part of the judgment-roll. It is true they were set forth in the statement on motion for a new trial originally in the record, but they were there merely as a part of said statement. When this court struck out that statement, it also struck out of the record the instructions in the case, and, therefore, they are not before us for any consideration whatsoever.

The judgment is affirmed.

Opinion by BUCK, J.

CITY OF SOUTH OMAHA v. POWELL.

Supreme Court, Nebraska, March, 1897.

PRACTICE.—An exception to all of the instructions is unavailing if any one of them is correct.

SAME.—Where several distinct requests to charge are denied, an exception to the refusal of all of them is insufficient, unless it appears that each should have been given.

SAME.—An assignment in a motion for a new trial, that a group of instructions is erroneous, is bad if any one of them was properly given.

DEFECTIVE HIGHWAY — FALLING THROUGH BRIDGE. — A city is required to exercise reasonable care and diligence in keeping its streets in a safe condition for travel, and is liable for an injury to a traveler who fell through a bridge while driving over it, though the street of which it formed part was one not frequently used.

FROM a judgment of District Court, Douglas County, in favor of plaintiff, defendant brings error.

JAMES N. VAN DUSEN and E. T. FARNSWORTH, for plaintiff in error.

JAMES HASSETT and E. M. BARTLETT, for defendant in error.

In September, 1891, while the plaintiff below, James Powell, was crossing a bridge on F street in the city of South Omaha, with a team and loaded wagon, the bridge collapsed, throwing him, the horses and wagon into the creek, thereby injuring plaintiff and his team and breaking the wagon. This action was instituted against the city to recover the damages sustained. The trial resulted in

a verdict for the plaintiff in the sum of \$5,000, and he having filed a remittitur for \$2,500, a judgment was rendered in his favor for a like amount. The city has removed the record into this court for review.

Exception was taken in the trial court to the instructions *en masse*,—those refused and also those given. Therefore error cannot be predicated upon the instructions unless the entire charge was bad, or each of the requests should have been given. *Railway Co. v. Montgomery*, (Neb.) 68 N. W. 619, and cases there cited. There is no claim that all the instructions given are erroneous, and, where they are not, such an exception is insufficient. Again, the instructions were improperly assigned in the motion for a new trial, they being grouped in the assignments of error therein. Similar assignments in motions for new trials have been held insufficient repeatedly, and that they would be considered by the appellate court to the extent alone of ascertaining if any one of the instructions was correct in each group given, and that at least one of those refused was properly denied. Since each assignment in the motion for a new trial is not well taken as to all the instructions referred to therein, it requires no further consideration at our hands. *Railway Co. v. Montgomery*, *supra*.

The court excluded testimony offered by the city for the purpose of showing that the bridge where the accident happened was located on a street in an unfrequented and remote part of the city, over which the travel was not so great as on other streets of the city. This ruling is now assailed. The testimony was not material. It was the duty of the defendant to keep all its streets and bridges in a reasonably safe condition for travel, whether located in one part of the city or another; and its care and diligence in respect of them are not controlled or affected by the fact that the bridge or street is less frequently used than others within the municipality. *City of Lincoln v. Smith*, 28 Neb. 762, 45 N. W. 41; *City of Ord v. Nash*, 69 N. W. 964 (1).

The plaintiff received a permanent injury, and a judgment for \$2,500 is not so excessive as to call for a reversal.

Judgment affirmed.

Opinion by NORVAL, J.

1. *City of Ord v. Nash*. (Neb.) is reported in 1 Am. Neg. Rep. 110, *ante*.

CITY OF HASTINGS v. MILLS.

Supreme Court, Nebraska, March, 1897.

COSTS—JUSTICE OF THE PEACE.—Mills sued the city in the District Court, claiming \$5,000 damages, which he alleges he had sustained by falling into an excavation in one of the streets negligently left unguarded. He recovered a verdict for \$200. *Held*, (1) That assuming the excavation was a nuisance, within the meaning of section 621 of the Code of Civil Procedure, a justice of the peace had jurisdiction to render judgment for the amount of the verdict, and, therefore, Mills was not entitled to recover costs; (2) that the amount claimed by Mills in his petition deprived a justice of the peace of jurisdiction to try the case, but the amount recovered determined his right to recover costs.

The right of a litigant to recover costs is a statutory, not a common-law right.

ERROR to District Court, Adams County.

A. H. BOWEN, for plaintiff in error.

C. H. TANNER, for defendant in error.

In the District Court of Adams county Artie L. Mills, by his next friend, sued the City of Hastings for damages for an injury which he alleged he had sustained by falling into an excavation in one of the streets of said city, negligently permitted by it to remain unguarded. He had a verdict and judgment for \$200. Thereupon the city moved the court for an order to tax it with only its costs, and not with the costs made by Mills. This motion the District Court overruled, and permitted Mills to recover from the city the costs expended by him in the action. To reverse this order the city prosecutes here a petition in error.

The points decided are stated in the syllabus made by the court.

Judgment reversed.

Opinion by RAGAN, J.

CONSOLIDATED TRACTION COMPANY v.
SHAFFERY.*Supreme Court, New Jersey, February, 1897.*

COLLISION—WAGON STRUCK BY STREET CAR.—Where the plaintiff was injured by being thrown from his wagon, that was struck by a trolley car, as he was driving out of the way of another car on the other track, the

questions of negligence were for the jury, and a verdict for the plaintiff would not be disturbed.

ERROR to Circuit Court, Essex County. Judgment for plaintiff and defendant brings error.

GEORGE T. WERTS, for plaintiff in error.

SAMUEL KALISCH, for defendant in error.

GARRISON, J.—The basis of this action, which is for personal injuries, is a collision that occurred between one of the defendant's cars and the wagon of the plaintiff. Stated generally, the facts were that the plaintiff, who had been driving upon defendant's east-bound track, was required to leave it, in order to permit the passage of a car that had come up behind him. He drew over to cross to the west-bound track, and had so far crossed it that the hind wheels of his wagon alone were on the track, when a car of the defendant, coming towards him on the west-bound track, struck a hind wheel, throwing the plaintiff from his wagon. The result of our examination of the case is that every rule of law pertinent to the liability of the defendant, or to the relative duty of the parties, under the circumstances, deducible from the evidence, was laid before the jury, in a charge that lacked no element necessary to its clearness and accuracy. No principles of law were laid down that had not already been pronounced by the appellate tribunals of this State, and no application of them made that did not leave to the jury the questions proper to be left, and which would tend to aid them in their discharge of their duty.

A careful review of the numerous assignments of error fails to disclose any ground upon which this judgment can be disturbed.

NEW JERSEY ELECTRIC RAILWAY COMPANY v. MILLER.

Court of Errors and Appeals, New Jersey, March, 1897.

COLLISION AT CROSSING—VEHICLE—RIGHT OF WAY.—Upon a request to charge "that it is the duty of a driver approaching the line of a street railway company, where his view is impeded by vehicles so that he cannot see up the track, to wait till he reaches a point where his sight is not impeded, before going on the track," the trial judge instructed the jury that "he ought to be able to see far enough up the track to see that he has the right of way; and he has the right of way if he can get upon the track before the car would reach that point if going at a reasonable rate of

speed." *Held*, that he should in effect have charged that the driver would have the right of way if, proceeding at a rate of speed which, under the circumstances of the time and locality, was reasonable, he should reach the point of crossing in time to safely go upon the tracks in advance of the approaching car, the latter being sufficiently distant to be checked, and, if need be, stopped before it should reach him.

(Syllabus made by the Court.)

FROM Circuit Court, Passaic County. Judgment for plaintiff, defendant brings error.

EUGENE STEVENSON, for plaintiff in error.

JOHN W. HARDING, for defendant in error.

MCGILL, CH. — This was an action for damages occasioned by a collision between a trolley car and a wagon driven by the plaintiff below, which resulted in the plaintiff's being thrown to the ground, and injured. The plaintiff drove easterly through Ward street, which opens into and terminates at Railroad avenue, in the city of Paterson, and, upon reaching Railroad avenue, drove into it, and upon the tracks of the New Jersey Electric Company there located, purposing to turn and drive along Railroad avenue, when the collision occurred. The judge charged the jury that it was entirely plain that the plaintiff below had the right of way across the trolley track as he drove out of Ward street upon Railroad avenue, and that the motorman knew, or was bound to know, that the plaintiff had the right of way if he chose to go on across the track. He also charged that both the plaintiff below and the motorman were bound to exercise reasonable care to prevent a collision, and that, if the jury should find that the plaintiff had contributed to the accident by his negligence, he could not recover. The effect of these propositions, taken together, was to lead the jury to the implication that in proceeding to use the right of way, which the charge conceded to him, the plaintiff was not guilty of negligence. The defendant's counsel was not satisfied with the court's assumption of the fact that the plaintiff had a right of way, which he might use without being guilty of negligence, and in order that the jury might pass upon the question whether he had such right, as a question of fact, he requested the court to charge as follows: "That it is the duty of a driver approaching the line of a street-railway company, where his view is impeded by vehicles, so that he cannot see up the track, to wait till he reaches a point where his sight is not impeded, before going on the track." To this request the judge charged: "He ought to be able to see far enough up the track to see that he has the right of way, and he has the right of way if he can get upon the track before the car would reach that point if going at a reasonable rate of speed."

In this definition, the auxiliary verb "can" denotes possibility, and the import of the definition is that if, by the quickening of his speed, the driver may be able to reach the crossing before the electric car, if the car should proceed at a reasonable speed, he would have the right of way, in the lawful use of which, as the jury were led to imply in the previous charge, he would be free from negligence. In other words, we think that the jury was given to understand that if the driver of a vehicle, in approaching a trolley crossing in a highway, could, by activity, reach the crossing before the car, if the latter should be run at a reasonable speed, he would have the right to proceed upon his way, without being guilty of negligence. The possibility of the acquirement of a superior right by activity is the vicious element in the proposition. Its import is inconsistent with that deliberate exercise of reasonable care which the law requires. It is true, the judge had previously, in his charge, said that the driver must exercise reasonable care; but that part of the charge was not referred to in the special disposition of the request to qualify the proposition of the judge. We think that the proposition should, in effect, have been, that the driver would have the right of way if, proceeding at a rate of speed which, under the circumstances of the time and locality, was reasonable, he should reach the point of crossing in time to safely go upon the tracks, in advance of the approaching car; the latter being sufficiently distant to be checked, and, if need be, stopped, before it should reach him. In the particular indicated an error injurious to the defendant below was committed. There must be a *venire de novo*.

LIPPINCOTT, MAGIE, BOGERT, DAYTON and HENDRICKSON, JJ., dissent.

MCCANN v. CONSOLIDATED TRACTION COMPANY.

Court of Errors and Appeals, New Jersey, March, 1897.

MASTER AND SERVANT. — A master is responsible for the negligence of his servant causing injury to a third party, although the act of the servant was contrary to the orders of his master, if done in the execution of the master's orders.

HORSE FRIGHTENED BY STREET RAILWAY CAR. — Where black coats were hanging on the projection, at the side of a street water sprinkler, operated by electricity, by, along and on the tracks of an electric street railway, and the coats, by waving to and fro in the wind or by operation of the car

sprinkler along the tracks, frightened a well-broken horse of gentle disposition and caused injury to the plaintiff, who was thrown from his carriage, the question whether the employees of the defendant, the street railway company, were in the exercise of reasonable care to prevent injury in operating such street car sprinkler, and the consequent liability of the company for the injuries to the plaintiff, is a question which the trial court must submit to the jury for their determination, even though it be that the coats belonged to such employees and were by them hung upon the projection of the car.

FROM Circuit Court, Essex County, in action by McCann against Consolidated Traction Company. Judgment for defendant. Plaintiff brings error.

HOWARD W. HAYES, for plaintiff in error.

JOSEPH COULT, for defendant in error.

This is an action to recover damages for personal injuries. The defendant in error (the defendant below) operates an electric street car line of railway in the city of Newark. On the line of its street railway, and on the tracks thereof, the defendant company, at times, for the purpose of allaying dust, operates a water sprinkler. This car or tank is propelled by electricity, and operated and managed by a motorman and one or two other employees of the defendant. It is a car upon which a large tank of water is placed. On August 11, 1895, the plaintiff in error was driving a horse, attached to a low-top buggy, along Washington avenue, one of the streets upon which the car was being operated, when his horse took fright at the car, became unmanageable, and turned sharply around, and threw the plaintiff out of the buggy, and severely injured him. At the conclusion of the evidence on the part of the plaintiff, the trial judge, on motion of the defendant, directed a nonsuit.

The evidence of the plaintiff shows that the horse was a well-broken animal, and of a gentle disposition, and although very often, both day and night, it had been driven on the streets in the presence of the ordinary electric cars, had never before become frightened by them. The plaintiff was driving along Washington avenue to the north, while the sprinkling car was approaching from the opposite direction. When about twenty-five feet apart, the horse became frightened. The plaintiff, in his evidence, says that the car was "an enormous big tank, they had on trial there, painted yellow." The evidence also shows that upon a projection of the car, at or near the rear thereof, there were hanging two black coats, which, by the motion of the car, were caused to swing to and fro, and wave in the air something like a flag. The plaintiff describes them as a blanket, which kept swinging out. Other witnesses speak of the objects as

coats hung upon a projection from the side of the car at the rear thereof, which, from the motion of the car, swung to and fro. An ordinary electric car was going in the same direction as the plaintiff, while the tank car was approaching in the opposite direction. The cars passed each other, and, when the tank car came in view, the horse stopped, turned sharply around, and threw the plaintiff out. The horse, after so turning around, became at once manageable, and the plaintiff was afterwards driven home in the buggy. The plaintiff testifies that the swinging coats on the sprinkler scared the horse. The plaintiff, with the horse, on this same day, had passed the ordinary electric cars, to which the horse had paid no attention. Some evidence was admitted, over objection, to show that the car was in a condition, both by reason of the bright yellow color, and because of the moving coats thereon, calculated to frighten an ordinary well-broken horse. It is not here intended to consider the admissibility of the evidence that the color of the car was calculated to frighten horses, and it is not deemed in any sense to have been the cause of the accident to the plaintiff in this case. Upon this motion to nonsuit, it must be taken as an indisputable conclusion that the black coats were hanging on the projection of the sprinkler waving to and fro; and whether the operation of the sprinkler in this condition by the employees of the defendant in charge of it constituted negligence, causing the horse to be frightened, and consequent injury to the plaintiff, was a question which should have been submitted to the jury.

The defendant's right to use a sprinkler upon its tracks for lawful purposes cannot be denied, but its use of the highway in this manner must be exercised with reasonable care and thus so far protect from injury others who are in the lawful use of the street. If the sprinkler was in a condition calculated to frighten the horse, and thus cause injury, it certainly became a question for the jury to determine whether the defendant had neglected to exercise reasonable care in this respect or not. The liability for injuries resulting from horses being frightened by unusual sights in the highway caused by a defendant has been distinctly recognized (1). There is

1. The court cited *Mallory v. Griffey*, 85 Pa. St. 275, where a horse was frightened by a large stone along the highway. *Jeffrey v. St. Pancras Vestry*, 63 L. J. Q. B. 618, where a steam roller frightened plaintiff's horse. In the latter case, Collin, J., in speaking of the construction of a carriage for

use on a highway, says: "But on the other hand, if he has his carriage constructed and painted in such a manner as to be very conspicuous indeed, it might then become a nuisance." *Harris v. Mobbs*, 3 Exchr. Div. 268, where a horse was frightened by a plow, left alongside a public road. *Watkins v.*

no evidence who hung the coats upon the projection, but the fact is well established that they had been hanging in this condition for some time previous to the time of the accident, and the car was being operated with them in this position; whether they were placed there by the defendant company, by its employees, or by a stranger, is not material so long as they created a dangerous situation of which the employees had knowledge and still continued to operate the car. And if the employees used the car when it was in a dangerous condition or they themselves, in operating it, did that which rendered it dangerous, the defendant company became liable for the consequences. The general rule is a very clear one that the master is liable for any act of his servant done within the scope of his employment, and "if a servant is acting in the execution of his master's orders, and, by his negligence causes injury to a third party, the master will be responsible, although the servant's act was not necessary for the proper performance of his duty to his master or was even contrary to his master's orders." Smith, Master & S. (Blackstone's ed.), p. 295, and cases cited. The case of *Walton v. Car Co.*, 139 Mass. 556, 2 N. E. 101, cited as supporting the trial court in this nonsuit, is distinguishable from the one at bar.

Judgment reversed.

Opinion by LIPPINCOTT, J.

CADWELL V. ARNHEIM.

Court of Appeals, New York, March, 1897.

INJURED IN COLLISION WITH RUNAWAY HORSES. — Where it appeared that one of the defendant's horses was frightened by being struck by gravel thrown by a passing horse and the team ran away; that they crossed to the left side of the road and collided with plaintiff's team coming in the opposite direction; that defendant's coachman, who had twenty years' experience as a driver and had driven the horses more than two years, at no time was able either to stop them or pull them back to the right side of the road, and that the horses were gentle and had never indicated any disposition to run away; the plaintiff should have been nonsuited as his injuries were the result of inevitable accident.

Reddin, 2 Fost. & F. 629, where appearance and noise of a steam engine frightened a horse. *Phelon v. Stiles*, 13 Conn. 426, where a servant left bags of bran by the roadside. *Howe*

v. Young, 16 Ind. 312, where plaintiff's horse was frightened by reckless driving of defendant. In each of the cases cited, the question of negligence was submitted to the jury.

EVIDENCE — CONDUCT OF DRIVER. — The admission of evidence of expert horsemen who were not eyewitnesses of the occurrence, that while runaway horses may not be stopped they may be guided, was questionable, and was not sufficient to raise an issue as to the conduct of defendant's coachman.

APPEAL from judgment, Supreme Court, General Term, affirming judgment in favor of plaintiff.

CHRISTOPHER FINE, for appellant.

A. R. DYETT, for respondent.

The plaintiff brought this action to recover damages from the defendant for injuries sustained by himself and to his horses and carriage as the result of being run into by a pair of horses attached to a carriage belonging to the defendant, and driven by his coachman. The charge is that the horses and carriage were negligently driven by the defendant's servant at the time. Viewing it in the light most favorable to the plaintiff, it seems impossible to resist the conclusion that he sustained the injuries to his person and property of which he complains through an inevitable accident, and that so far from the evidence disclosing some act of commission or of omission on the part of the defendant's coachman, which permitted the occurrence, it shows that though an experienced driver, he found himself unable to avoid running into the plaintiff's horses and carriage.

The main facts are not disputed. In the afternoon of April 30, 1891, the defendant's coachman was driving a pair of horses attached to a victoria, in which were seated the defendant's wife and mother-in-law. They were upon what is known as the westerly drive of the Central Park, in the city of New York, when a passing horse and wagon threw up some gravel or mud upon the nigh or left-hand horse of the defendant's pair, with the effect of so frightening him that he kicked up and got his right hind leg over the carriage pole. Upon this happening, the pair of horses became unmanageable, and ran away. They were proceeding in a northerly direction at the time, and were upon the right-hand side of the road. In running away, they kept upon a straight line on the right side of the road, until they reached, after a run of two or three blocks, a part of the drive where it curved to the right hand. At that point the frightened horses, continuing in their straight course, crossed the driveway, and kept on upon the left side. The plaintiff's horses and carriage were then coming south upon the drive, keeping to the right side of the road in that direction, and were first seen by the defendant's coachman when some 200 feet apart, and approaching each other head on. According to the plaintiff's account, he had no

opportunity to get out of the way, and was on the extreme right of the road. He said that the defendant's horses were running away when he first saw them, but he did not know what had made them do so. The horses met head to head, throwing the plaintiff's horses down, and himself out of the carriage. The only other persons who could testify as to the runaway and the collision were the defendant's coachman and the two ladies in his carriage. It was conceded upon the trial that the defendant's horses were perfectly gentle, and they had been driven by the same coachman for a little over two years. There had been no previous experience with them which indicated any disposition to run away, and everything about the harness and carriage was in proper shape and in good condition. The coachman was a man of about forty years of age, and had been driving for over twenty-one years. He had driven for the defendant for something over four years, and one of the plaintiff's own witnesses testified to his being a very skilful driver.

The coachman was a witness and testified that the horses ran straight as far as the road was straight, and then when they came to the curve, they went to the gutter; that he tried with all his might to pull them out of the gutter and could not do it; that from his experience of a driver of horses attached to coaches, it was impossible for any driver to have stopped that team in the condition it then was; that he was pulling his horses trying to stop them and pulling them to steer clear of Mr. Cadwell; that it was not possible for him to have stopped his horses at the time they became frightened nor during any time until the collision occurred. His testimony that the nigh horse of his pair got his leg over the carriage pole was confirmed by one of the plaintiff's witnesses, a park policeman named Murphy. He described particularly the condition in which he found things after the collision and could not be shaken in his statement that the defendant's nigh horse had his right hind leg over the pole. It must be regarded as established in the case that the cause of the runaway and the condition of the nigh horse were as described by the coachman. The defendant's wife and mother-in-law also gave corroborative testimony. The theory of the plaintiff in seeking to hold the defendant responsible for what occurred was that the coachman might have so controlled his horses after they ran away as to avoid the collision. Acting upon this theory, the plaintiff introduced evidence by persons skilled in driving horses, to show that while runaway horses may not be stopped, yet that they can be guided. The admissibility of that kind of expert evidence was perhaps questionable; but its presence cannot be said to affect the result in the present case. None of them witnessed the occurrence.

Persons who had seen what occurred and who had observed the acts of the coachman at the time might very properly give their testimony, and if it conflicted with that of the coachman, an issue would arise which only the jury should determine. But the evidence as to what the coachman did, given by himself, and by the ladies in the carriage, was not contradicted. There is no rule of law which compels a person driving horses upon a highway absolutely to keep them under control. He is bound only to exercise that reasonable care which a man of ordinary prudence might be expected to exercise under the same circumstances. The difficulty with the plaintiff's case was that the facts failed to disclose any fault in the driver of the defendant's horses or to warrant a jury in deciding that he could have controlled the action of the frightened animals.

Judgment reversed.

Opinion by GRAY, J.

HARROUN ET AL. V. BRUSH ELECTRIC LIGHT COMPANY.

Court of Appeals, New York, March, 1897.

PRACTICE—AFFIRMANCE—UNANIMOUS DECISION.—Where a case is heard by only four of the five justices composing an appellate division of the Supreme Court, and all four concur in the decision, it is a unanimous decision under the Const. art. 6, sec. 2, making four justices a quorum, and is final under the provisions of sec. 191, Code Civ. Pro. subsec. 2, providing that in certain cases a unanimous affirmance shall be final.

APPEAL from judgment, Supreme Court, Appellate Division, affirming judgment for plaintiff.

CHARLES ROE, for motion.

GEO. F. YEOMAN, opposed.

BARTLETT, J.—This is an action made by the plaintiff to dismiss the appeal. The action is to recover damages for the death of plaintiff's intestate, resulting from injuries caused by the alleged negligence of defendant. The jury rendered a verdict for \$5,000 in favor of plaintiff. A motion for a new trial on the minutes was denied. From the judgment upon the verdict, and the order denying a new trial, an appeal was taken to the Appellate Division of the Fourth Department, which resulted in an affirmance. The order of affirmance reads: "Opinion by Follett, J. Adams, J., not sitting. All concur, except Adams, J., not sitting." 42 N. Y. Supp. 716.

A motion was subsequently made before the Appellate Division for a re-argument, or for permission to appeal to this court, which was denied, all the members of the court concurring; Adams, J., not sitting. 43 N. Y. Supp. 1155. Notwithstanding this decision, and without application to a judge of this court for leave, the defendant took this appeal. The sole question presented is whether, under the circumstances as stated, there was a unanimous decision of the Appellate Division. It is argued by the defendant and appellant that article 6, sec. 2 of the Constitution provides that the State shall be divided into four judicial departments; that there shall be an Appellate Division of the Supreme Court, consisting of seven justices in the First Department, and five justices in each of the other departments; that in each department four justices shall constitute a quorum, and the concurrence of three shall be necessary to a decision; that no more than five justices shall sit in any case. This being so, it follows, says the appellant, that in the Fourth Department the Appellate Division consists of five justices, and that a quorum of four hearing a case, and affirming it on the vote of all, it cannot be regarded as a unanimous decision, under the provisions of section 191 of the Code of Civil Procedure, subsec. 2. We are of opinion that a quorum of four justices, holding an Appellate Division, are, in contemplation of law, the Appellate Division, and that their unanimous vote of affirmance is a compliance with the provisions of the Constitution and Code. When the Constitution provides that four justices shall constitute a quorum, it is, in effect, conferring upon four the powers with which five were invested. A quorum is the number of the members of a body competent to transact business. A judicial or legislative body having a quorum present proceeds ordinarily as if every member was sitting in his place, and exercises all the powers with which it is invested. Any other rule would greatly embarrass the transaction of business in case of illness or voluntary or enforced absence among the members. Any other construction of the statute would be unreasonable, impracticable, and result in great public inconvenience. It follows that this appeal is unauthorized, and it should be dismissed, with costs. All concur. Appeal dismissed.

BUTCHER V. HYDE ET AL.

Court of Appeals, New York, March, 1897.

INJURED WHILE LEAVING THEATER. — Where plaintiff was injured by falling down stairs while leaving a theater, and plaintiff's evidence showed that the sixth step was defective, it was error to refuse to charge that if the plaintiff fell from the fourth or fifth step the verdict must be for the defendant.

APPEAL from judgment, City Court of Brooklyn, affirming a judgment entered on verdict in favor of plaintiff.

BENJAMIN F. TRACY, for appellant.

DAILEY, BELL & CRANE, JAMES D. BELL, of counsel, for respondents.

The defendants were the proprietors of a theater in the city of Brooklyn. On the afternoon of March 8, 1893, the plaintiff attended a matinee at their theater. She occupied a seat in the balcony. At the conclusion of the entertainment, while descending to the floor below, she received the injuries for which she seeks to recover in this action. The stairs by which she descended led to a landing, and from the landing to the floor below. The plaintiff, while descending, tripped or her foot was caught, she fell, and was seriously injured. The plaintiff testified that her left heel was caught on one of the steps, she didn't know whether four or five steps down, and she was pitched head first on the landing; that the step from the landing on which she caught her foot was five or six; that she thought she fell four or five steps; that the front part of her heel must have been caught. A witness, who was with the plaintiff at the time, testified that the rubber on the sixth step was loose for about six or seven inches, and it stood up about an inch and a half; that she saw that two of the nails were out of the rubber, and that the nail holes were closed up with dust. The grandson of the plaintiff also testified that he went to the theater on the night following the accident and that he examined the rubber on the sixth step from the landing; that the rubber was loose and projected up, and that two nail holes or tack holes were filled with dust; that the rubber projected up about an inch and a half and for a distance along the edge of the step of about six inches. Two witnesses for defendant corroborated that portion of the evidence of the plaintiff which was to the effect that she fell from the fourth or fifth step. Other witnesses testified that the plaintiff stated that she did not know how

she fell and others that she stated she must have tripped on her dress. Nine witnesses, three from the audience, testified that there was no disarrangement of the rubber on the sixth step or on any of the steps of the staircase upon which the plaintiff fell. This review of the evidence discloses that the plaintiff's proof of negligence on the part of the defendants was at most slight, and seems to indicate that the preponderance of evidence was to the effect that the claimed defect in the stairs did not exist. It is at least doubtful if she sufficiently proved the defendant's negligence. At the close of the evidence and after the court had made its principal charge, the defendants requested it to instruct the jury that if the plaintiff fell from the fourth or fifth step, the verdict must be for the defendants. The court declined, and the defendants duly excepted. We think this was error. There was no proof of any defect except that two nails which formerly fastened the rubber to the sixth step were missing. Consequently the only important question for the jury related to the condition of the rubber upon that step. The effect of the refusal to charge the request amounted to a tacit instruction by the court to the effect that, if there was a rubber covering on any one of the steps that was loose and projected above the surface, the plaintiff might recover, although there was no evidence that there was any defect except to the sixth.

Judgment reversed.

Opinion by MARTIN, J.

SCANLON v. CITY OF WATERTOWN ET AL.

Supreme Court, New York, Appellate Division, Fourth Dept., February, 1897.

MUNICIPAL CORPORATION—DELEGATING DUTY TO KEEP STREETS

SAFE.—A municipal corporation cannot absolve itself from its obligation to keep its streets safe for public travel, by an attempted delegation of its duty to an independent contractor, who is performing a public work, by expressing in the contract a provision for the protection of the public by the contractor.

INJURED BY FALLING INTO EXCAVATION IN STREET.—Where a person attempted to cross after dark an excavation in a public street, which she had crossed a few days previously by means of a temporary bridge which had since been removed, and she met people coming from the opposite direction, having crossed on ties six inches wide that had been substituted for the bridge, but on account of the darkness she could not see upon what they crossed and she fell into the excavation, the city was liable, notwithstanding there were some logs lying on the pathway.

APPEAL from judgment, Supreme Court Circuit, Jefferson County, entered on verdict for \$2,000 in favor of plaintiff. . .

EDWARD N. SMITH, for appellant, City of Watertown.

PURCELL & CARLISLE, for appellants Ryan & Avery.

C. H. WATTS and D. G. GRIFFIN for respondent.

Plaintiff brings this action for personal injuries sustained by falling into an open sewer in process of construction in the city of Watertown.

The work was being prosecuted under a contract with the defendants Ryan & Avery, who stipulated in the contract that barriers and lights should be placed at all dangerous places and that "watchmen shall be stationed at such dangerous places, if required, and such other means taken as will tend to prevent accident or injury to persons or property in consequence of the work."

The plaintiff, in her complaint, alleged that while attempting to cross from the west to the east side of Washington street, at about eight o'clock in the evening of October 6, 1894, on the crosswalk, she fell into the sewer by reason of the negligent manner in which the same had been left by the defendant, and without fault on her part.

Washington street was one of the principal thoroughfares of the city, and the sewer where the accident occurred was ten feet deep and from eight to ten feet wide. It was conceded by one of defendant's witnesses that at no other point along its entire length were greater dangers presented to travelers. No watchman was stationed there to warn people. The evidence as to the character and extent of the means adopted to prevent accident was more or less conflicting, so that a clear question of fact respecting the defendant's negligence was raised; and counsel upon the argument frankly conceded that as to that feature of the case the verdict of the jury was conclusive.

The contention that the city of Watertown is not liable for the injuries which befell this plaintiff rests upon the assumption that by entering into an independent contract with a third party to construct the sewer, over whose methods and acts it had no control, and from whom it had exacted a stipulation that proper precautions should be taken for the protection of the public, the municipality relieved itself from all further duty or obligation in respect of the matter. Such is the general rule. *Wood v. City of Watertown*, 58 Hun, 298, and cases cited. The circumstances of this case create an exception to that rule.

The defendant is a municipal corporation, and it rests under an obligation to keep its streets in a proper and safe condition for

public travel. It cannot absolve itself from this liability by an attempted delegation of its duty to a third party who happens to be prosecuting a public work under contract. *Storrs v. City of Utica*, 17 N. Y. 104; *Busso v. City of Buffalo*, 90 Id. 679; *Pettingill v. City of Yonkers*, 116 Id. 558. The case of *Herrington v. Village of Lansingburgh*, 100 N. Y. 145, cited by counsel for the defendant, has no application to the one now under consideration. There the plaintiff's horses were frightened by a blast and he was injured while attempting to control them. The court said: "The horses did not become restless or frightened from anything existing in the street, and the accident *was in no way caused by any imperfect condition of the street*, but simply by noise resulting from the blast."

As to the question of excessive amount of damages, we do not feel disposed to interfere with the jury, who saw and heard the various witnesses and to whom this feature of the case was fully submitted.

The serious question in this case is that presented by the defendant's third proposition, which is, in effect, that in approaching this open sewer the plaintiff was unmindful of the obligation resting upon her to exercise such a degree of care and caution as should be commensurate with the dangers surrounding her. It is well settled that a person using a public street may walk or drive by day or night, relying upon the assumption that the street is kept by the city in a safe and proper condition for public travel. *Pettingill v. City of Yonkers*, *supra*. But this rule has no application where a traveler approaches an obstruction with knowledge of its existence and location. *Weston v. City of Troy*, 139 N. Y. 281; *Whalen v. Citizens' Gas Light Co.*, 151 N. Y. 70, 1 Am. Neg. Rep. 120.

The plaintiff had notice of the excavation, for she had seen it and walked over it a few days before, and therefore we should be inclined to hold, as matter of law, that she was guilty of contributory negligence upon her own narration if it were not for other facts and circumstances.

It seems that a platform or bridge had been constructed by the contractors to throw across this chasm, upon either side of which there was a hand-rail and at either end of which was a step and a guard-rail. When properly adjusted, this bridge connected the crosswalk in such a manner as to afford a perfectly safe and easy means of passage over the sewer. The plaintiff was aware of this bridge and of its purpose. On Wednesday she crossed it. Saturday was the day of the accident, and on Thursday the bridge had been removed. She supposed it was still there. There was no sign or notice to indicate any change, and as she was approaching the sewer she met people coming from the opposite direction who had

apparently just crossed the same, and one or two testified that they had crossed, having walked upon some ties about six inches in width which had been thrown over the excavation. The plaintiff testifies that she was looking ahead to see where she was going; that she supposed the bridge was there; that it was dark, and the first thing she knew she went into the ditch, feet first. She was corroborated by a witness who was walking behind her. There was evidence that there were some logs laid on the crosswalk, and it was contended that the plaintiff could not have reached the sewer without climbing over them, and that this was of itself ample notice of the situation. The plaintiff testified that she did not climb over anything, but walked straight ahead. Some witnesses testified that there was a space of two or three feet on the south side that was not covered by the logs, and that the logs were thrown across the walk "promiscuously."

While the case, so far as this branch of it is concerned, may be regarded as verging upon the border line, we are inclined to think that upon the whole it was properly disposed of at the circuit.

Judgment affirmed.

Opinion by ADAMS, J.

MCPHERSON v. CITY OF BUFFALO.

*Supreme Court, New York, Appellate Division, Fourth Department,
January, 1897.*

WALKING ON ICY SIDEWALK. — In an action against a city for negligence, it cannot be said that, as matter of law, where the plaintiff saw the icy condition of a sidewalk, and in attempting to walk upon it, fell and was injured, that he was guilty of contributory negligence (1).

MUNICIPAL CORPORATIONS—ORDINANCE. — Where it was shown that, in violation of a city ordinance requiring an owner to remove all snow and ice, which might have fallen upon the sidewalk in front of his premises, an accumulation of ice and snow, nine inches thick, had been permitted to remain for a sufficient time before the accident, to charge the city with notice thereof, the question of negligence of the city was for the jury.

APPEAL from judgment of Supreme Court, Trial Term, Erie County, entered on verdict for \$675.50, in favor of plaintiff.

CHARLES L. FELDMAN, for appellant.

WILLIAM L. JONES, for respondent.

1. See *Dipper v. Inhabitants of Milford (Mass.)*, 1 Am. Neg. Rep. 457, *ante*.

About eight o'clock in the evening of February 23, 1895, while plaintiff was walking on the sidewalk on the south side of West Ferry street, between Delaware and Elmwood avenues, in the city of Buffalo, plaintiff alleges that he was thrown down and received severe injuries to his coccyx, and that he was laid up several months and has not permanently recovered; that he expended over \$200 endeavoring to be cured. The answer contains several denials and alleges contributory negligence on the part of plaintiff.

To sustain the allegations of the complaint, the plaintiff produced evidence tending to show that there was an accumulation of ice and snow along the walk at the point where he received the injury of which he complains. The case is similar to *Evans v. The City of Utica*, 69 N. Y. 166, where the court said that the question of contributory negligence was for the jury, and that assuming the plaintiff was notified, the inference by no means follows that the plaintiff was negligent; "as the case stands it cannot properly be urged that, as matter of law, contributory negligence was manifest so as to justify a nonsuit." In *Smith v. Ryan*, 29 N. Y. St. Rep. 672, it was held: "It is not negligence *per se* for a person knowing the defective condition of a sidewalk to pass over it" (1).

The evidence offered in behalf of plaintiff was such that within the principles and authorities referred to we are of the opinion that the submission of the question of plaintiff's freedom from contributory negligence to the jury was proper, and that their verdict in that respect ought not to be disturbed.

Upon the question of defendant's negligence, we think there was evidence given upon the part of plaintiff to establish that the defendant had been derelict in its duty. One witness testified that he examined the walk two or three days after the injury and found nine inches of ice. Several witnesses detail the circumstances relating to the condition of the walk, tending strongly to indicate that it was left in an unsuitable condition for a period of time sufficient to attract the attention of the city authorities. There was evidence given on the part of the defendant tending to contradict the evidence offered by plaintiff, and we are of the opinion that the trial judge committed no error in submitting the question of defendant's negligence to the jury, and that their verdict is sustained by the evidence. The case differs from *Durr v. Village of Green Island*, 71 Hun, 260, and *Kinney v. City of Troy*, 108 N. Y. 567, and also from *Harrington v. City of Buffalo*, 121 N. Y. 147. It appeared in evidence that

1. The court cited to the same effect, *Mayor*, 99 N. Y. 654; *Sherman v. Vil-*
Pomfrey v. Village of Saratoga *lage of Oneonta*, 49 N. Y. St. Rep. 267,
Springs, 104 N. Y. 460; *Bullock v. affirmed*, 142 N. Y. 637.

the city had ordinances imposing upon adjacent owners the duty of keeping the sidewalks in a suitable condition, and the evidence in the case indicates that in regard to the street in question the city neglected to enforce an observance of the ordinances or to keep the sidewalk in such a condition as to comply with the tenor of the requirements found therein.

Judgment affirmed.

Opinion by HARDIN, P. J.

EATON v. NEW YORK CENTRAL AND HUDSON RIVER RAILROAD COMPANY.

*Supreme Court, New York, Appellate Division, Fourth Department,
February, 1897.*

FELLOW-SERVANTS—DEFECTIVE BRAKE.—Where a brakeman was injured while operating a defective brake on a car that had been inspected by the defendant's inspector, and the brakeman knew of a rule that made it his duty to inspect the brakes at every stop of the train, he was a fellow-servant of the inspectors, and the company was not liable.

APPEAL from judgment, Supreme Court, Trial Term, Wayne County, in favor of plaintiff.

EDWARD HARRIS, for appellant.

WILLIAM S. JENNEY, for respondent.

Action for a personal injury caused, it is alleged, by the negligence of the defendant. From 1882 until November 17, 1890, the plaintiff was in the employ of the defendant as a brakeman. On November 17, 1890, the defendant received at East Buffalo from the Lake Shore and Michigan Southern Railroad Company, a box car numbered 8468, which belonged to the Newport News and Mississippi Valley Railroad Company. It was inspected by the inspectors of the defendant, and placed at the rear of an extra freight train which left Buffalo between twelve and one o'clock in the afternoon of that day for Syracuse, N. Y. At 5:55 P. M. of the same day the train reached Rochester, and the plaintiff attempted to set the rear brake on the car numbered 8468. When he applied force to the brake wheel the eyebolt in the lower end of the brake shaft to which the brake chain connecting the brake shaft with the brake beam was attached gave way, and the plaintiff was thrown to the track and run over by the caboose; both of his legs were so crushed that the right one was amputated a few inches above the knee, and

the left one two inches below the knee. Plaintiff alleged that the brake was negligently constructed and worn, old and out of repair; that it was defendant's duty to furnish safe car brakes, etc., and keep the same in repair; that defendant neglected its duty and provided for plaintiff's use unsafe, defective and dangerous car brakes, and allowed the same to be used by him. Defendant alleged contributory negligence and negligence of fellow-servants. The case was tried twice. Plaintiff was nonsuited on the first trial, and the General Term of the Fifth Department set the nonsuit aside without writing an opinion. 86 Hun, 617. On this trial the plaintiff had a verdict for \$15,000.

The testimony given on the trial justified the jury in finding that some part of the eyebolt between the nut and eye was worn so that the worn part was about half its original size, and by reason thereof it broke when the plaintiff attempted to set the brake. Although there is no conclusive testimony on the point, it seems highly probable that the wearing was on that part of the eyebolt within the brake shaft. The only negligence alleged or attempted to be proved was the use by the defendant of this car having this worn and weakened eyebolt. It will be borne in mind that this car was not owned by the defendant, but came on its road at East Buffalo on the morning of the day of the accident.

Two legal questions are presented: 1. Is the failure of the defendant's inspectors to discover that the eyebolt was worn negligence? and, if so, is it actionable negligence in favor of this plaintiff? 2. Is the failure of the plaintiff to discover the defective eyebolt negligence on his part?

At East Buffalo three of defendant's inspectors inspected the car, and there appears noted in the inspector's notebook defects in car No. 8468, but none that had any relation to the cause of the accident. It may be that whether the defect in the eyebolt was a latent or a patent one, discoverable or not discoverable by reasonable inspection, was a question for the jury; however, in discussing the case, I shall assume that it was a question of fact for the jury, and was found for the plaintiff. The plaintiff testified that he "had some duties with reference to this train before leaving (East Buffalo). I passed along the cars to see the couplings were all made and the cars were sealed. I passed along one side." He testified that another brakeman passed along the other side; that he did not see anything out of order; that he had been employed as a brakeman by the defendant for about eight years; that he had seen the following rule many times; was familiar with it, and observed it:

Rule 153: "At all stoppings of trains the brakeman or trainmen

must inspect the wheels, brakes and trucks of the cars and report any defects immediately to the conductor."

By this rule it was the duty of the plaintiff to inspect the brakes on this car at stations where the train stopped. The plaintiff testified that the train stopped three times before reaching Rochester, once for ten minutes, and twice for about fifteen minutes each. Thus it appears that it was the plaintiff's duty to inspect the brakes of this car on four occasions, the first time at Buffalo. If he neglected to obey the rule he was negligent, and his negligence contributed to the accident. If the defective eyebolt were discoverable by a reasonable inspection and he failed to discover it, he was negligent, and his negligence contributed to the accident. If the defect were latent and not discoverable by a reasonable inspection, neither the plaintiff nor the inspectors were negligent. Upon the general question whether car inspectors and brakemen are fellow-servants, the authorities do not agree. *Besel v. N. Y. C. & H. R. R. Co.*, 70 N. Y. 171; *Bailey v. R. W. & O. R. R. Co.*, 139 Id. 302; *Northern Pacific R. R. Co. v. Herbert*, 116 U. S. 642; *Harrison v. Central R. R. Co.*, 31 N. J. L. 293. But none of these authorities reach the case at bar, for the reason that in none of them does it appear that inspection was a duty imposed on the brakeman as well as on the inspectors. It would not, I think, be contended that the three inspectors were not fellow-servants, though performing master's duties, and that any one of them could recover against the company for the negligence of his co-inspector, and I do not think the case of the plaintiff is different. If it were negligence in the inspectors not to have discovered the defect which caused the accident, it was the negligence of the co-employees, and if it were negligence on the part of the inspectors, the plaintiff was equally negligent, and he should have been nonsuited.

Unless the defect were discoverable by reasonable inspection, the accident arising from it was one of the ordinary risks of the plaintiff's employment. *Goodrich v. N. Y. C. & H. R. R. Co.*, 116 N. Y. 398.

Judgment reversed.

Opinion by FOLLETT, J.

HORTON v. VULCAN IRON-WORKS COMPANY.

*Supreme Court, New York, Appellate Division, Fourth Department,
January, 1897.*

MASTER AND SERVANT. — Where it appeared that the plaintiff was hired by H., the treasurer and manager of the defendant, to build a wall on his property, occupied by the defendant, to separate it from the defendant's adjoining property, and the plaintiff built a scaffold on the defendant's side of the line against the protests of H., and was cautioned by defendant's foreman to look out for a set screw on a revolving shaft, by which he was injured, while engaged in the erection of the wall, the relation of master and servant was not established by the evidence.

RISK OF EMPLOYMENT. — The factory act (Laws 1892, ch. 673, sec. 8), does not change the law that employees assume the obvious risk of the business undertaken.

CONTRIBUTORY NEGLIGENCE. — Where a person was at work near a revolving shaft, upon which was a set screw, of which he had knowledge, and was injured while attempting to crawl under it, he was guilty of contributory negligence.

APPEAL from judgment, Supreme Court, Trial Term, in favor of plaintiff.

D. P. MOREHOUSE, for appellant.

L. W. BAKER, for respondent.

Upon the premises of the defendant was a machine shop in which was a shaft upon which were pulleys and collars. The shaft extended north and south at right angles to and came within a few inches of the line of the brick wall plaintiff was laying up, but the defendant owned the premises only to within ten feet of the wall. In the northerly pulley, on the shaft, and next to the wall, was a collar in which was a set screw some five-eighths of an inch square, and the end set out seven-eighths of an inch. Holbrook was the manager and treasurer of the defendant company, and had first made a contract with plaintiff and his partner to rebuild defendant's machine shop, and afterwards contracted individually for a stone wall to be built between the land occupied by him and the company, respectively. Then he made a contract for the erection of a brick wall on the stone wall as a foundation.

From the evidence it is quite clear that Holbrook owned the premises where the wall was being constructed, although the same had been for some time in the possession of the defendant. Holbrook entered into an agreement with plaintiff and his partner

Petrie, to perform services in the erection of the wall at the price of \$4.50 per 1,000 brick, and after it had progressed so as to require a platform to work upon they built a platform or scaffold on the south side of the wall next adjacent to the property of the defendant. It appears that when they commenced the erection of the wall Holbrook remonstrated with them very strongly against building a scaffold on the south side of the wall, insisting that it would interfere with the business of the defendant, and expressed his strong desire to have them build a scaffold on the north side of the wall. However, they persisted in using the south side for the erection of a scaffold. After they had erected the wall so far as was convenient by means of the first scaffold, they erected a second one which came within some two and one-half feet of the shaft, and they placed runways from the scaffold in a southerly direction into the premises of the defendant. The business of the defendant was in progress, and it was in daily use of the machinery in its building, using the shaft for the purpose of propelling the same during the whole period of time that the plaintiff and his partner were engaged in the erection of the wall. The premises north were vacant. It appears that when Holbrook remonstrated with them against using scaffolds on the south side instead of on the north side they replied: "It would be more trouble to scaffold it, to put up a scaffold there. They could build on the scaffold with very little scaffolding. They insisted upon building on that side." Petrie testified that it would have been possible to have had a mason work on each side of the shaft, and not have anybody pass under there; that it would cost ten dollars more to have erected a scaffold on the north side. Evidence was given that tended to show that neither Horton nor Petrie, nor any one in their behalf, ever requested the defendant to stop the shaft. A witness testified that he saw the plaintiff pass under the shaft and that he heard Mr. Smith caution the plaintiff about doing so; that the set screw could be plainly seen from the ground when the shaft was revolving. At the time of the accident it was making about fifty revolutions a minute. Plaintiff testified that he was a mason for forty-eight years, and had other accidents happen to him; that he knew the shaft was there and that he passed under it for his own convenience in working; that he had to get down on his knees and crawl under.

It appeared by the evidence that when he was passing under the shaft his clothing was caught and he was carried around several times until the shaft was stopped, and that he received a broken arm and a broken leg and was otherwise injured. The evidence failed to establish the relation of master and servant between the

plaintiff and the defendant. *Russell v. Buckhout*, 87 Hun, 47, 34 N. Y. Supp. 271; *Olive v. Marble Co.*, 103 N. Y. 292, 8 N. E. 552.

The evidence tends strongly to indicate that the plaintiff took the risk of the situation when he sought to pass under the shaft which he knew was in motion. In *Cobb v. Welcher*, 75 Hun, 283, 26 N. Y. Supp. 1068, it was said that even under the factory act the proprietor of a factory is not an insurer of the safety of his employees. In *Kinsley v. Pratt*, 148 N. Y. 372, 42 N. E. 986, it was held that: "There is no reason in principle or authority why an employee should not be allowed to assume the obvious risks of the business, as well under the factory act as otherwise."

We think that the plaintiff was guilty of contributory negligence at the time he received the injury.

Judgment reversed.

Opinion by HARDIN, P. J.

MCCARTY v. CITY OF LOCKPORT.

*Supreme Court, New York, Appellate Division, Fourth Department,
January, 1897*

MUNICIPAL CORPORATIONS—FALLING UPON DEFECTIVE SIDEWALK.—Where the evidence only showed that the plaintiff fell and was injured by stepping upon a slightly sloping stone of a sidewalk that was covered with a thin coating of ice, the jury was not warranted in finding a verdict for plaintiff, as the fall might have been due as much to plaintiff's carelessness as to the defective structural condition of the sidewalk.

APPEAL from judgment, Supreme Court, Trial Term, in favor of plaintiff.

D. E. BRONG and C. M. SOUTHWORTH, for appellant.

A. K. POTTER, for respondent.

On the 22d of November, 1892, at about 11:55 A. M., plaintiff fell on the sidewalk on the south side of Main street in defendant city, nearly opposite the door leading into Wright's book store, and in the fall fractured his right hip bone and was confined to his house some eight weeks. He was passing westerly, and when nearly opposite the door of the book store he met a lady passing eastwardly, and instead of turning to the right he turned to the left to allow her to pass, they both being nearly in the center of the sidewalk; and as he stepped out to the left he placed his foot upon a stone that was sloping to the north some three and one-eighth inches in two feet and one inch, according to his testimony, and that of some of his

witnesses, he placed his foot upon the stone known in the diagrams and exhibits produced as "No. 12." There is considerable evidence, however, tending to show that he placed his foot not upon stone marked No. 12, but upon some other stone which was said to be sloping towards the street. If he stepped on stone No. 12, the stone which lay next north of it, according to the evidence, was sloping towards the south, and there was some depression caused in the sidewalk. As one witness expressed it, the stones were "dishing." There is some evidence tending to show that the plaintiff discovered at the time, or just before the accident, the sloping in the sidewalk.

Upon the question whether the plaintiff was free from contributory negligence a very slender case was made in his behalf. The sidewalk being on the south side, and the buildings obstructing the sun, there is some evidence tending to show that the sun did not reach the walk to produce a thaw or melting of the snow or ice that had gathered thereupon. There is some evidence that about an eighth of an inch of snow had fallen in the forenoon of the day of the injuries. Some of the witnesses say the sidewalk was slippery and one witness says it was greasy by reason of the snow that had fallen that forenoon upon the sidewalk. The trial judge carefully submitted the question of the plaintiff's freedom from contributory negligence to the jury, and they apparently have found that the plaintiff was free from contributory negligence. A close question arises upon the evidence as to whether the defendant was guilty of negligence in not having caused the stone to be brought to a level, the same having been affected by the action of the frost from time to time.

The evidence is not very satisfactory that the plaintiff used that care and caution due from him by reason of the effect of the elements upon the sidewalk. The defect complained of was very slight. In *Beltz v. City of Yonkers*, 148 N. Y. 67, 42 N. E. 401, it was held that a municipality "is not chargeable with negligence in omitting to repair a defect in a street so slight that no careful or prudent man would reasonably anticipate any danger from its existence." In *Searles v. Railway Co.*, 101 N. Y. 662, 5 N. E. 66, it was said: "When the fact is that the damages claimed in an action were occasioned by one of two causes, for one of which the defendant is responsible, and for the other of which it is not responsible, the plaintiff must fail if his evidence does not show that the damage was produced by the former cause. And he must fail also if it is just as probable that they were caused by the one as by the other, as the plaintiff is bound to make out his case by the preponderance

of evidence." That case is approved in *Taylor v. City of Yonkers*, 105 N. Y. 209, 11 N. E. 642, where the plaintiff slipped upon the ice and the court said: "It is possible that the slope of the walk had something to do with the fall. It is equally possible that it did not. To affirm it is a pure guess and an absolute speculation. Are we to send it to a jury for them to imagine what might have been?"

It is not reasonable to say that the evidence indicates that the injuries which the plaintiff received were due solely to the alleged defect in the structural condition of the sidewalk. To say that the slippery condition of the walk caused by the elements was not a proximate cause of the injuries is to indulge in speculation, surmise or guess. The evidence is not satisfactory to warrant submitting the case to the jury on that question. See *Hunter v. Railroad Co.*, 116 N. Y. 624, 23 N. E. 11; *Kaveny v. City of Troy*, 108 N. Y. 577, 15 N. E. 727; *Safford v. Village of Green Island*, 26 N. Y. Supp. 669. We think the evidence insufficient to support the verdict.

Judgment reversed.

Opinion by HARDIN, P. J.

MARRINAN v. NEW YORK CENTRAL & HUDSON RIVER RAILROAD COMPANY.

*Supreme Court, New York, Appellate Division, Fourth Department,
January, 1897.*

FELLOW-SERVANTS—INJURED WHILE PREPARING TO COUPLE CARS.—Where an employee was injured while preparing the coupling on a car, by the locomotive being backed down upon him by a fireman operating it, there could be no recovery as they were fellow-servants, and there was no evidence of any rule prohibiting the operation of a locomotive by a fireman.

EVIDENCE.—The incompetency of an employee cannot be shown by general reputation, and evidence that an employee was called "Crazy Nolan" by his co-employees was properly excluded.

APPEAL from judgment, Trial Term, Monroe County, dismissing complaint.

CHARLES VAN VOORHIS, for appellant.

ALBERT H. HARRIS, for respondent.

The plaintiff was a plumber employed by defendant to attend to the repair of air brakes on the cars, and "to open the couplings in case of an engine backing down to the cars to couple." About

eight o'clock in the evening of August 6, 1893, while the plaintiff was engaged in preparing a coach and locomotive for coupling, the locomotive was backed against the coach crushing plaintiff's left arm so that it was necessarily amputated at the elbow.

William V. Nolan, who moved the locomotive about six or eight feet at the time of the accident, had been employed by defendant since November 1, 1887, as fireman, except that during four or five months in 1891 and 1892 he acted as engineer after having been examined by the master machanic of the division as to his qualifications. The plaintiff attempted to establish a cause of action by showing that the defendant had a rule which prohibited firemen from running locomotives out of the round-house and about the yard, and that Nolan was violating the rule, and had been so accustomed to violate it that the defendant's officers knew or ought to have known of his practice. No such rule was shown to have been established and promulgated as one of the regular printed rules of the defendant. One witness for plaintiff testified that there was an oral rule not to allow a fireman or engineer to run a locomotive out of the round-house, unless the crew was on it, but that he knew of no rule forbidding a fireman to run a locomotive. The crew of a locomotive consists of the engineer and fireman. Another witness testified that he was employed by defendant and had seen such a rule typewritten, but on cross-examination said that the rule forbade firemen from taking locomotives out of the round-house unless the engineer was on board. The engineer of this locomotive had stepped from the ground to the steps of the locomotive, just as Nolan moved it back to the coach, having been oiling the engine. Another person was on the locomotive at the time of the accident, but what his duties were does not appear; but as the locomotive was about to depart with a train it is inferable that he was the fireman, or that either he or Nolan was the fireman, so there was a full crew in charge of the locomotive, and no rule which was proved or hinted at was violated.

It was insisted that the evidence was such that the jury had the right to find that Nolan was reckless and careless in the management of locomotives, which fact was known or ought to have been known to the defendant. Nolan had had a single accident while serving as engineer, and had run another locomotive a bit faster than a person in charge of another attached locomotive thought he should, and on another occasion backed a locomotive against a car with force. This falls short of raising a question of fact whether Nolan was competent to back a locomotive six or eight feet, which was all he did, the engineer being then in charge of the locomotive.

The plaintiff offered to show that William V. Nolan, by reason of

his reckless and careless habits, was called by defendant's employees "Crazy Nolan," which was objected to. The objection was sustained, and an exception taken. The rule in New York is that the incompetency of an employee may not be shown by general reputation. *Baulec v. Railroad Co.*, 59 N. Y. 356; *Lyons v. Railroad Co.*, 39 Hun, 385. In *Hasken v. Railroad Co.*, 65 Barb. 129, affirmed, 56 N. Y. 608, it was held that it was not competent to prove the reputation of the engineer of the train by which the plaintiff's intestate was killed (1).

Plaintiff testified Nolan asked him if it was all right, and he said "No, not yet." Nolan denied this. Whatever the fact, Nolan and plaintiff were fellow-servants, and no recovery can be had.

Judgment affirmed.

Opinion by FOLLETT, J.

KIERNAN v. MAYOR, ETC., OF NEW YORK CITY.

*Supreme Court, New York, Appellate Division, First Department,
February, 1897.*

MUNICIPAL CORPORATIONS—ABSENCE OF BARRIER AT EMBANKMENT.—Where it appeared that a girl, twelve years old, became dizzy from the heat, while walking on a sidewalk, and fell over an embankment twelve feet high, at the edge of the walk that had flagstones four feet wide, that were four feet distant from the edge of the embankment, the question of the city's negligence, in failing to erect a barrier at the edge of the embankment, was for the jury.

APPEAL from judgment, Trial Term, New York County, entered on verdict for plaintiff.

FRANCIS M. SCOTT and WILLIAM H. RAND, JR., for appellant.

THOMAS P. WICKES, for respondent.

This was an action for personal injuries alleged to have been caused by the negligence of the defendant. The accident in which

1. It was held in *Gilman v. Railroad Co.*, 13 Allen, 433; and in *Monahan v. City of Worcester*, 150 Mass. 439, 23 N. E. 228, that in case it was shown that the employee who caused the accident was intoxicated or infirm, the general reputation of the employee for drunkenness or infirmness might be shown for the purpose of showing that

the defendants had or ought to have had notice of his infirmity. The same rule is laid down in *Davis v. Railroad Co.*, 20 Mich. 105, and in *Massachusetts and Pennsylvania. Hatt v. Nay*, 144 Mass. 186, 10 N. E. 807; *Connors v. Morton*, 160 Mass. 333, 35 N. E. 860; *Frazier v. Railroad Co.*, 38 Pa. St. 104.

the injuries were received occurred on September 27, 1895, on Fleetwood avenue, between 162d and 163d streets, in the city of New York. The city had caused the avenue at this point to be graded by building an embankment upon it about twelve feet above the level of the lot adjoining it and practically the entire width of the avenue. The embankment was constructed under a contract and was completed and accepted by the city in August, 1895. There was no guard or barrier on the easterly edge of the embankment, nor was the erection of one provided for in the contract. There was a row of flag stones four feet wide in the middle of the sidewalk space, and four feet two inches distant from the edge of the embankment. They were in perfect condition at the time of the accident. The day of the accident was exceptionally hot, the thermometer standing at 2 P. M., 120 degrees; at 3 P. M., 115 degrees, and at 4 P. M., 104 degrees. Between 2 and 3 P. M. the plaintiff, a girl twelve years of age, after performing an errand, was returning to her home along the avenue, and while walking along the flag walk above mentioned, her foot tripped, she became dizzy, lost consciousness, and knew nothing further until she was found at the bottom of the embankment. She had evidently gone off the embankment, fallen to the land below, and had been seriously injured. Nothing appears in the case to charge the plaintiff with contributory negligence. The only question argued is that the evidence was insufficient to charge the defendant with negligence in failing to have a guard or barrier on the easterly edge of the embankment, which would, evidently, have avoided the accident. It is the duty of a municipal corporation to keep and maintain its streets and sidewalks in a reasonably safe condition, and whether the duty has been performed so as to relieve the corporation from the charge of negligence is a question for the jury under the circumstances of each particular case. The absence of a guard or barrier along the edge of an embankment at the side of a street, road or bridge, has frequently been found by juries to constitute negligence, for which actions could be maintained, and such findings have been upheld by the courts. *Fitzgerald v. City of Binghamton*, 40 Hun, 332, affirmed, 111 N. Y. 686, 19 N. E. 286; *Ivory v. Town of Deer Park*, 116 N. Y. 476, 22 N. E. 1080; *Maxim v. Town of Champion*, 50 Hun, 88, affirmed, 119 N. Y. 626.

It is said that the failure to have a guard or barrier along the edge of this embankment was the exercise of a quasi-judicial or discretionary power by the city authorities, and therefore cannot be made the basis of a charge of negligence. *Urquhart v. City of Ogdensburg*, 91 N. Y. 67; *Id.*, 97 N. Y. 238; *Hubbell v. City of Yonkers*, 104

N. Y. 434, 10 N. E. 858; *Monk v. Town of New Utrecht*, 104 N. Y. 553, 11 N. E. 268. These cases were decided on their own peculiar facts, and have since been frequently distinguished by the courts in the cases above cited. The city very likely could not be held liable merely because the contract did not provide for such guard or barrier; but after the contract was completed and the work was accepted by the city, it maintained the street without a guard or barrier. The question whether the street and sidewalk in that condition were reasonably safe for public travel when this unguarded embankment was so close to the sidewalk was a question of fact for the jury.

Judgment affirmed.

Opinion by WILLIAMS, J.

MOELLER v. DELAWARE, LACKAWANNA AND WESTERN RAILROAD COMPANY.

*Supreme Court, New York, Appellate Division, Fourth Department,
January, 1897.*

**CRUSHED BETWEEN CARS—NEGLIGENCE OF FELLOW-SERVANT—
VIOLATION OF RULE.**—Where a carpenter and his helper were repairing a car, on a side track, without displaying a flag on the car as required by a rule of the company and in known violation thereof by the carpenter, and the helper was killed by a car being run against the one upon which they were working, by an engineer, who did not know of their presence, because of the absence of the flag, the cause of the accident was the negligence of a fellow-servant, and the company was not liable.

APPEAL from judgment of Trial Term, Oneida County, entered on verdict for plaintiff.

WILLIAM KERNAN, for appellant.

SMITH M. LINDSLEY, for respondent.

Action for damages for the death of the plaintiff's intestate caused, it is alleged, by the negligence of the defendant. The intestate, who was a carpenter, was employed by defendant in repairing cars in its yard at Utica, N. Y., and while engaged in repairing a car upon a side track he was crushed between two cars and died on the same day. Thatcher was the master mechanic of the Utica division, having charge of shops, mechanics and trainmen, with power to hire and discharge employees. Krickmeir was foreman of the carpenters, under whom was Nicholas Young, a carpenter, engaged in repairing cars. Thomas Jones was foreman, having charge of laborers and

helpers, under whom was plaintiff's intestate. Krickmeir directed Young to repair a brake on a car standing on a side track. Plaintiff's intestate was Young's helper, and the two went to the car to repair the brake. Eight or ten feet from the car was a milk car on the same track, and some distance from the milk car were coal cars. The intestate began to remove the defective brake with his back to the milk car and coal cars. While standing with one foot between the rails, at work, a car was shunted on the track with such force that it struck the coal cars which in turn struck the milk car, forcing it against the car upon which the intestate was at work and crushing him to death.

The only negligence on the part of the defendant which was sought to be established on the trial was that this car was not properly guarded and that defendant had failed to establish and enforce rules for the protection of its employees while engaged in repairing cars on side tracks. This was the question litigated. Rules printed on the employee's time-tables were introduced in evidence, by which it appeared from rule 75 that a red flag was directed to be put on a car by the men employed in repairing it.

Nicholas Young, a witness sworn in behalf of the plaintiff, testified that he and the intestate went together to repair the brake on the defective car; that he knew of the existence of rule 75; that he had read it and that he and the intestate did not put up red flags on that occasion, because they thought "it would be such a short job there wouldn't be any need of it;" that he knew where there was a red flag that day; that he knew he disobeyed orders as he understood them that day. At the time of the accident, Young and the intestate were engaged in a joint act in repairing this brake; and in case the intestate knew of the rule, he was negligent; but, assuming that he did not know of it, Young did, and his negligent disobedience of rule 75 was the cause of the accident. Thus it appears that the accident was caused by the joint negligence of the intestate and of Young, or was caused by the negligence of Young, who was the intestate's fellow-servant, which defeats the plaintiff's right to recover. The engineer in charge of the locomotive having no notice that a car was being repaired on the side track, was not negligent in shunting the car onto that track.

Judgment reversed.

Opinion by FOLLETT, J.

**REILLY v. SICILIAN ASPHALT PAVING
COMPANY.**

*Supreme Court, New York, Appellate Division, First Department,
February, 1897.*

INJURIES TO PROPERTY AND TO PERSON—JUDGMENT IN ONE ACTION BAR TO ANOTHER.—Where a judgment is rendered and satisfied in an action for injuries to personal property, it is a sufficiently substantial defense to entitle the defendant to be allowed to plead it in a supplementary answer in an action for damages for injuries to the person where both causes of action arose out of the same negligent act, and the judgment was rendered and satisfied subsequent to the service of the answer.

APPEAL from Special Term, New York County.

HERBERT C. SMYTH, for appellant.

JAMES KEARNEY, for respondent.

Action for personal injuries alleged to have been sustained through defendant's negligence. Prior to the service of the answer, plaintiff brought another action against the defendant in the District Court, based upon the same state of facts as in the complaint in this action, but instead of asking for damages for personal injuries, demanded judgment for damages to the wagon in which he was riding when the accident occurred. Judgment was rendered for plaintiff in the District Court action, and was satisfied after the service of the answer in this action, and from an order denying defendant's motion for leave to file a supplementary answer, defendant appeals.

The District Court judgment was recovered and satisfied subsequent to the service of the answer in this action, and unless some good legal reason was shown to the contrary, the motion should have been granted. The learned judge at Special Term denied the application on the case of *Perry v. Dickerson*, 85 N. Y. 345. In that case the plaintiff brought an action to recover damages for an alleged wrongful dismissal from defendant's employment, before the expiration of a stipulated term. It was held that a judgment therein was not a bar to a subsequent action to recover wages earned during the time the plaintiff was actually employed and due and payable before the wrongful dismissal, and that the two claims constituted separate and independent causes of action upon which separate actions were maintainable; that to sustain a plea of a former judgment in bar it must appear that the cause of action in both suits was

the same, or that some fact essential to the maintenance of the second suit was an issue in the first action. This, however, is not a case where two causes of action spring out of the same contract, but is one in tort.

In *Nathans v. Hope*, 77 N. Y. 420, it is said that "where a claim arises upon a contract or from a tort the entire claim must be prosecuted in a single suit." "Where several suits are brought, the pendency of the first may be pleaded in abatement of the other suit or suits, and a judgment in either will be a bar to a recovery in any other suit." See, also, *Secor v. Sturgis*, 16 N. Y. 548. Without expressing any view upon the merits of the defense, we think it was error not to accord to the defendant the right to serve the proposed supplemental answer.

Reversed.

Opinion by O'BRIEN, J.

LEWIS v. CITY OF SYRACUSE.

*Supreme Court, New York, Appellate Division, Fourth Department,
January, 1897*

MUNICIPAL CORPORATIONS — GENERAL AND SPECIAL LAWS —

DEFECTIVE SIDEWALK. — The general law of 1886, that an action against a city for personal injuries must be commenced within one year after the cause of action accrues is not applicable in an action against the city of Syracuse, a section of the charter of which passed in 1885, and re-enacted in 1888, provides that notice of the injuries must be served within six months and the action commenced within one year after the service of the notice.

APPEAL from judgment, Circuit Court, Onondaga County, entered on verdict for \$500, in favor of plaintiff in action by James Lewis for injuries by reason of defective sidewalk.

CHARLES E. IDE, for appellant.

D. F. McLENNAN, for respondent.

In October, 1893, plaintiff was walking on a plank sidewalk, in the city of Syracuse, in the company of two other men. As one of the men stepped on the end of one of the planks it tipped up and the plaintiff who was following was struck on the ankle by the other end, so that he tripped, and fell and broke his right wrist, and was disabled for about eight months. The action was commenced in March, 1895, more than a year after the accident.

The record fairly establishes the fact that the plaintiff received

the injuries at the time and place specified and that they were the result of a defective condition of the sidewalk. But there was no evidence to establish the fact that the defendant had received actual notice of the defective condition of the walk. There was some evidence tending to show that the stringers upon which the planks rested were more or less decayed and that the planks themselves had been loose for several weeks prior to the day of the accident. This evidence was of such a character as to justify the jury in drawing the inference that the walk had been in a defective condition for such a length of time as to require the municipal authorities to take notice of that fact within the rule laid down by the learned trial justice defining "constructive notice."

It is insisted, however, that the plaintiff cannot maintain his action for the reason that it was not brought within one year after the accident occurred, and cites chap. 572 of Laws of 1886, sec. 1 (1).

Although this statute is general in its application to the class of cities to which the defendant belongs it has no relation to the case in hand, as the charter of the city of Syracuse as revised and amended by chap. 26, Laws of 1885, contained a provision applicable thereto (2).

The act of 1886 did not in express terms repeal this section, nor is there anything in its language which discloses an intention upon the part of the legislature to amend or modify the same. A special and local statute is not repealed or amended by a statute general in its terms unless the intent to repeal or alter is manifest. In *re Central Park*, 50 N. Y. 493; *McKenna v. Edmundstone*, 91 N. Y. 231; *Buffalo Cem. Assn. v. City of Buffalo*, 118 N. Y. 61. This case does not furnish an exception to the rule as in *re Dobson*,

1. L. 1886, ch. 572, sec. 1, is as follows: "No action against the mayor, aldermen and commonalty of any city in this state having fifty thousand inhabitants or over, for damages for personal injuries, alleged to have been sustained by reason of the negligence of such mayor, aldermen and commonalty, or of any department, board, officer, agent or employee of such corporation, shall be maintained, unless the same shall be commenced within one year after the cause of action therefor shall have accrued."

2. L. 1885, ch. 26, sec. 250, is as follows: "The city of Syracuse shall not

be liable in a civil action for any injury or damage resulting from any defect or improper condition in or upon any street or sidewalk, unless written notice, specifying the time, place and cause of such injury or damage shall be served on the mayor or city clerk, within six months after the injury or damage was received, nor unless an action shall be commenced within one year after the service of such notice. No action to recover or enforce any such claim against the city shall be brought until the expiration of forty days after the claim shall have been presented in the manner and form above provided."

146 N. Y. 357, from which it is distinguishable in several essential particulars which it is unnecessary to refer to, as there is a stronger reason why the act should be regarded as inapplicable to the city of Syracuse from the fact subsequent to its enactment, and in 1888, sec. 250 was amended and modified, but the provision requiring notice of an injury to be served upon the mayor or city clerk within six months after the same was received, and an action for such injury to be commenced within one year after the service of such notice, was re-enacted. Laws 1888, ch. 449. It follows that in re-enacting this provision in its charter the legislature intended to perpetuate a local and special law for the government of this particular municipality, instead of subjecting it to the provisions of the general act. *Ely v. Holton*, 15 N. Y. 595; *Van Denburgh v. Village of Greenbush*, 66 N. Y. 1.

It is not disputed that the plaintiff served the proper notice upon the mayor and city clerk within six months after receiving his injury, nor that this action was commenced within one year after such notice was so served.

Judgment affirmed.

Opinion by ADAMS, J.

GOLDSCHMID v. MAYOR, ETC., OF CITY OF NEW YORK.

*Supreme Court, New York, Appellate Division, First Department,
February, 1897.*

LIABILITY OF MUNICIPAL CORPORATION FOR DAMAGES TO LOT IN GRADING STREET — INDEPENDENT CONTRACTOR. — Where a city in grading a street finds it necessary to build a retaining wall and the work is done by a contractor, it is liable for an encroachment upon the land of an adjacent owner, and for damages caused by the use of poor materials, where the contract provided that the wall should be placed where indicated on the plan prepared by the city, and the materials used should be subject to the inspection of the commissioner of street improvements, and it appeared that the wall was built under the supervision of an inspector of the city.

FAILURE OF PROPERTY OWNER TO PROTEST. — The failure of the property owner to protest at the time of the erection of the wall, will not estop him from claiming damages for the encroachment.

DAMAGES — LOSS OF RENTS. — The owner is entitled to damages for the difference between the value of the land before the wall was built and the value thereafter, and also for the loss of rents caused by the tenants leaving because of the encroachment.

APPEAL from judgment of Trial Term, Supreme Court, New York County, in favor of plaintiff in action by Otto Goldschmid.

CHASE MELLEN, for appellant.

HENRY A. GUMBLETON, for respondent.

Plaintiff was the owner and in the possession of a lot of land. It became necessary to fix the grade of the street in front of the plaintiff's premises and it was established at a height of about twenty-two feet above the surface of the ground along the front of the plaintiff's lot. The city undertook, through a contractor, to fill in the street and for that purpose caused to be erected a retaining wall along the whole front to the necessary height. The wall was located by the engineers in the employ of the city, and was built by the contractor under the direction of the city officials. It was claimed by the plaintiff that this wall was actually built over the line of his premises, and that it was so badly constructed that after the earth had been filled in behind it on the street, it bulged out so that it projected over his lot for something over a foot and that the stones were continually falling from the wall upon his land, so that it was unsafe to approach near to the wall, and in consequence he was practically deprived of the use of his premises for some considerable distance about the place where the wall stood. For these alleged wrongs he brought this action against the city, joining as a defendant, also, the contractor who did the work. Upon the trial of the action the jury found a verdict in favor of the contractor, but against the city, for about \$800 damages, and from the judgment entered thereon the defendant appeals. No claim was made because of the change of grade of the street. The sole claim of the plaintiff was that the wall as built was actually located over the lot line so that the bottom of it stood in part upon his land and that the wall itself, as built, bulged over his land so as to occupy some portion of it, and practically deprive him of the use of the land over which the wall projected. His claim was that the wall was thus located by the direction of the city officials, and that the bulging of it came about solely because of the manner in which it was built, and the poor materials which were put into it, and that the city was responsible for this because it practically had the control and direction of the manner and material of which the wall was built. Unless the plaintiff was right in that contention it is clear that upon the law he was not entitled to recover.

A municipal corporation is not liable when it employs an independent contractor for damage which accrues because of the fact that the work was done in a negligent manner or with improper materials. To make the city liable it must have retained, by its contract,

power to direct and control the work. *Vogel v. Mayor, etc.*, 92 N. Y. 10, 18; *City of Chicago v. Joney*, 60 Ill. 383, 387; *Charlock v. Freel*, 125 N. Y. 357; *City of Cincinnati v. Stone*, 5 Ohio St. 38; *City of St. Paul v. Seitz*, 3 Minn. 297. Upon the facts there was no doubt that the city did retain the right to specify the place where the wall should be built and the manner of its construction. The contract provided that the walls should be built where indicated on the plan or where directed by the engineer, and that the materials used should be subject to the examination of the commissioner of street improvement. It was proved on the trial that an inspector was present all the time the work was going on. If, therefore, there was any encroachment upon the plaintiff's premises, or the wall when built was not sufficient for the purpose for which it was intended, it is quite clear that under the rule above cited the city could not escape liability. That the wall encroached upon the plaintiff's premises either because it was set over the line, or because it bulged so far as to overhang the plaintiff's premises to a considerable extent, was proved beyond any question. The jury were warranted in so finding.

The court was requested to charge that if the jury finds that the city or the contractor did build the wall on the plaintiff's land, it cannot find a verdict for the plaintiff unless it also finds that the plaintiff protested against the encroachment at the time. We cannot conceive of any principle upon which such a charge could have been based. That the plaintiff knew the wall was being put up is doubtless true, but that he knew it was on his premises or that he knew the exact location of his line is not shown. Nor would it be a matter of importance if it were.

The damages were not excessive. Where one has trespassed upon the lands of another, and the encroachment is practically a permanent one, as is the case here, the rule of damages is the difference between the value of the property before the trespass was committed and afterwards. *Argotsinger v. Vines*, 82 N. Y. 308. The plaintiff also lost his tenants because of the wall, and of the fact that the stones were continually dropping from it. *Lacour v. Mayor*, 3 Duer, 406.

Judgment affirmed.

Opinion by RUMSEY, J.

NILES v. NEW YORK CENTRAL AND HUDSON RIVER RAILROAD COMPANY.

*Supreme Court, New York, Appellate Division, Fourth Department,
February, 1897.*

MASTER AND SERVANT—COLLISION OF TRAINS.—Where it appeared that a conductor of a work train was killed by a following train running into his train, during a snow storm, and the following train had failed to stop as it passed the signal tower that had the danger signal out, and there was evidence that a semaphore, that the conductor's train had just passed before the collision occurred, was not set at "danger," the cause of the accident was violation by the co-employee of the rule to stop at the signal tower, when the danger signal was displayed.

RULES FOR MANAGEMENT OF TRAINS.—Negligence of a railroad company cannot be predicated upon its omission to establish rules for the management of trains, during snow storms, from the fact of its having established such rules during foggy weather.

APPEAL from judgment, Supreme Court, Trial Term, in favor of plaintiff.

C. D. PRESCOTT, for appellant.

I. J. EVANS and E. D. LEE, for respondent.

This action was brought to recover damages for the alleged negligent killing of the plaintiff's intestate, Charles H. Niles. The deceased was a conductor in charge of a work train, and had been in the employ of the defendant for thirty-eight years. The day of the accident was very stormy, the air was filled with blustering, blowing and falling snow, making drifts on the track. The Niles train left Oneida at 4:30 P. M., and the fast freight train passed through Oneida at 4:34½ P. M., and passed under the tower just east of Oneida, at 4:35½. The engine drawing the Niles train was run backward—that is, the tender of the engine was in advance of the engine—and it was so greatly impeded by the heavy snowdrifts that it was obliged to slow up several times. The train became stalled in a snowdrift somewhere about 100 feet east of the Verona block signal tower, and about 600 or 700 feet west of Verona station. When the fast freight reached the Oneida tower the signal was at "Danger," indicating that there was a train ahead in the block, but the towerman motioned to the engineer to proceed; and as the engine passed under the tower he attempted to throw a "caution card" to the engineer from the tower, but the wind blew it away and he failed to get it. But he says that he understood it was a

card authorizing him to proceed into the block with the understanding that there was a train ahead of him, and that he must run to the next signal with the train under complete control, expecting to overtake the preceding train. Klein, the engineer of the freight train, said he had no idea how fast they were running. "The snow was very deep and we couldn't go very slow. We had to go to keep our train going. We went between those towers not over fifteen or sixteen miles an hour. It might have been a little more or less." That when he passed the semaphore, or station signal, he reduced the speed to about ten miles an hour, as he knew he was within 1,200 feet or so of the tower. He states that he could stop the train in between 500 and 600 feet, but again he says that if Niles had sent a flagman back, it would have been necessary to go back between 600 and 700 feet. Being asked why he failed to stop at the tower, but went through it at that rate of speed, he answered: "At the time we approached Verona the snow was quite heavy there, and to come right down to a full stop before we came to the tower, we would have got stalled. We never would have got out, likely. So we run through the tower." According to his testimony the train reached the tower at 4:45½ P. M., making the run of 3.81 miles in eleven minutes, or at the rate of about twenty-three miles an hour.

In order to avoid the imputation of contributory negligence on the part of Niles, in not obeying the requirements of rule 95, which provides that the brakeman shall go back instantly when a train is stopped, and that the conductors will be held responsible for the enforcement of this rule, the respondent's counsel contends that the evidence sufficiently shows that the brakeman acted with due promptness in preparing to go back and flag the approaching train, but that it came upon them so quickly that no time was allowed for the fulfillment of the rule; that the fast freight train proceeded at a high rate of speed — from fifteen to twenty-five miles an hour — and the jury was warranted in finding that the work train and the freight arrived at Verona tower at about the same time the freight train having only about four miles within which to overtake the other, which had preceded it but five minutes ahead. Assuming this to be true, then we are unable to perceive any force in the contention that negligence may be predicated upon the failure of the company to properly inspect and maintain the semaphore, and that such omission was the proximate cause, or one of the proximate causes of the accident. It is insisted that the lever failed to operate the semaphore. There is no evidence that it was out of order. There is evidence that the semaphore stood at "Danger" shortly after the accident.

Plaintiff contends that the company was negligent in failing to

establish and promulgate reasonably safe and sufficient rules for the management and control of its trains and engines during severe and long-continued snow storms, similar to the rule for foggy weather, which provides that when a train cannot be seen at 300 yards trackmen must suspend ordinary work and patrol the track, acting as signalmen to warn trains of danger should there be any. It is inconceivable how negligence can be predicated upon the omission to establish a rule of that character.

We are of the opinion that the evidence is insufficient to establish negligence on the part of the company, and that the violation of the rules by co-employees, or their combined negligence was the producing cause of the injury sustained. Where regulations for the running of trains which are proper and suitable with a view to the safety of employees are prescribed obedience to these regulations by those having charge of a train is matter of executive detail, and for a disobedience of them, which causes injury to a co-employee, the master is not liable. *Slater v. Jewett*, 85 N. Y. 61. See *Corcoran v. R. R. Co.*, 126 N. Y. 673.

Judgment reversed.

Opinion by GREEN, J.

GILBERTSON v. FORTY SECOND STREET, MANHATTANVILLE AND ST. NICHOLAS AVENUE RAILWAY COMPANY (1).

*Supreme Court, New York, Appellate Division, First Department,
February, 1897.*

DAMAGES. — The submission to the jury for consideration in the way of damages of an element of which there was no evidence, is error.

DAMAGES. — An instruction that the jury might award a sum to any amount, not exceeding that mentioned in the complaint, was error, where there was not sufficient evidence to warrant such a finding.

ALIGHTING FROM STREET CAR — CHARGE OF COURT. — Where plaintiff's evidence showed that while attempting to alight from a street car that had fully stopped she was injured by the car starting, it was error for the court to charge that the plaintiff testified that the car was slowly moving as she attempted to alight, etc., and was not cured by a subsequent instruction that the only negligence attempted to be proved was the starting of the car after it had fully stopped.

1. For the report of this case in the Common Pleas, see 6 Am. Neg. Cas. 58.

APPEAL from judgment, \$10,865.66, Trial Term, Supreme Court, in favor of plaintiff.

W. H. PAGE, for appellant.

S. H. RANDALL, for respondent.

This action was brought to recover for injuries claimed to have been sustained by the plaintiff on the 26th of August, 1893, while alighting from a car of the defendant. The accident happened at the intersection of 68th street and the Boulevard. That the plaintiff was thrown down upon alighting from one of the defendant's cars and received serious injuries seems to have been satisfactorily proven. The questions litigated were whether the plaintiff had shown herself free from contributory negligence, and whether the defendant was guilty of negligence. The learned court in a part of its charge said: "Compensation takes in pain and suffering; takes in the loss of earning power. It takes in apprehension." There was no evidence whatever in the case showing that the plaintiff had suffered in the slightest degree from apprehension and it seems to be reasonably well settled that where there is an element submitted to the jury for consideration, in the way of damages, evidence of the existence of that element must have been presented or it is error to submit such an element to the jury. *Leeds v. Gaslight Co.*, 90 N. Y. 27. At the plaintiff's request the court charged the jury that "taking all the elements into consideration, the jury may award her compensation, fair, reasonable and just, to any amount not exceeding thirty thousand dollars." This was an intimation to the jury that, under the evidence which had been produced upon the trial, they would have the right to render a verdict for \$30,000, which was clearly not the fact. The judgment should be reversed and a new trial ordered.

Opinion by VAN BRUNT, J.

INGRAHAM, J.—I concur with the presiding justice in the conclusion that there should be a new trial, as I do not think that the real question in this case was fairly presented to the jury. The plaintiff testified that before she attempted to alight the car came to a full stop, and that it started while she was in the act of alighting. One other witness for the plaintiff testified that the car did not stop, but after recess was recalled and testified that the car did stop. The plaintiff's cause of action thus being based upon the allegation that the car did stop, but before she had an opportunity to alight it started, throwing her into the street, the court charged: "She says the car slowed so as to be barely if at all in motion, and that while she was endeavoring to put her foot to the street, and had not left the car, it started suddenly." This charge gave an erroneous

statement of the effect of her testimony. She nowhere stated that the car had barely stopped or was slightly moving at the time she attempted to alight. She stated positively that it had stopped, which statement was contradicted by all of the witnesses who saw the car, except the one witness for the plaintiff, who had first said the car had not stopped, but subsequently changed her testimony. The effect of this instruction was that the jury could find for the plaintiff in case they found that the car had not stopped, but, while moving slowly, suddenly started, and threw the plaintiff to the ground, of which there certainly was no evidence. The court subsequently charged at the request of the defendant, that if the plaintiff alighted from the car while it was in motion, and before it had come to a full stop, and that if the jury believed that the plaintiff was not injured through the starting of the car after it had stopped, the verdict should be for the defendant; and that the only negligence attempted to be proved in the case was the starting of the car after it had fully stopped, and before the plaintiff had an opportunity to alight. I do not think that these instructions can be said to have cured the error in the charge as made.

Judgment reversed.

O'DWYER v. O'BRIEN.

*Supreme Court, New York, Appellate Division, Fourth Department,
January, 1897.*

LANDLORD AND TENANT—INJURY TO TENANT.—Where it appeared that a tenant, while entering a gateway, tripped over a loose board, of which she was aware, but which she couldn't see because of a large basket she was carrying, she was guilty of contributory negligence, in looking in another direction than that in which she was going.

LANDLORD'S LIABILITY.—Although a landlord is not liable to the tenant or others upon the premises, for their condition or that they are tenantable, etc., if the premises are interfered with by the landlord, during the tenancy, and injury results from the negligence of the landlord, he is liable, unless the one injured is guilty of contributory negligence.

APPEAL from judgment, Trial Term, Erie County, in favor of plaintiff.

KENEFICK & LOVE, for appellant.

GEORGE W. COTHRAN, for respondent.

The defendant owned a tenement-house on the south side of Seneca street, in the city of Buffalo. It was occupied by two

tenants. The rear portion, some two years before the accident hereafter referred to, was leased by the defendant to the plaintiff's husband. The front portion was occupied by another tenant. The only means of access to the rear portion of the house from the street that was used in connection with that portion was an alleyway about four feet wide, extending from the street back about fifty feet to the entrance of the husband's premises. At the street there was a gate or gateway entering this alley about three feet wide. From this gate to the entrance to the husband's premises there were two planks, which seemed to have afforded a safe walk. The plaintiff's evidence tended to show that, during the time she had resided there, there was in addition to the two planks a third plank between the two planks and the building, shorter than the others, and not fastened down. This third plank extended to the gateway, and at the end next to the gate, at the time of the accident, stuck up above the ground from two to three inches. In February, 1894, this plank-walk was taken up by defendant's direction, to repair a sewer thereunder. The two planks were restored to their original condition, and the plaintiff claims that the loose plank next to the house was left in the condition hereinbefore described. Between that time and the 9th of May following, several members of the plaintiff's family had tripped up over the end of this loose plank at the gate; and it is quite clear from the evidence that the plaintiff was aware of the condition of this plank and fully understood the situation of the walk at the time of her injury. Her counsel upon this appeal seems to concede as much in his points. On the morning of the 9th of May, 1894,—a bright, clear morning,—the plaintiff had passed out through this alley to obtain a basket full of clothes from a place outside, and soon returning, with a large wash basket full of clothes, about three feet wide and four feet long, carrying the basket in front of her, she, without looking ahead of her, was passing through the gateway; she said she went in sideways and was looking across the street, when, as she stepped inside the gate the board caught her foot and threw her forward.

The plaintiff utterly failed in establishing her freedom from contributory negligence. Knowing, as she did, the condition of this plank, which created an obstruction at the gateway, she should have paid some attention to where she was going, as her vision in a manner was obstructed and her locomotion interfered with in carrying the burden in front of her; but, instead of doing so, she was looking across the street while proceeding on her journey. The nonsuit should have been granted for that reason. *Stephenson v. Gaslight Co.*, 14 N. Y. Supp. 67.

In the case at bar the alleyway was only used by one tenant, and was a part only of one tenancy, and, therefore, the same rule would be applied as if the plaintiff's husband were the sole tenant of the building. Had the defendant permitted the alleyway to remain in the same condition as when it was first rented to the tenant, the defendant would have come within the rule that a lessor, in the absence of fraud or an agreement, is not liable for the condition of premises or that they may be safely used for the purpose for which they were apparently intended. *Jaffe v. Harteau*, 56 N. Y. 401, and cases cited. But it appears that the defendant, for purposes of his own, dug up the alleyway during the tenancy. So the question arises if there was negligence on the part of this defendant in interfering with this alleyway, and as a result of that negligence the plaintiff was injured, whether she would not have an action therefor. It would seem upon principle that she would if she was free from contributory negligence.

Judgment reversed.

Opinion by WARD, J.

PITTSBURGH, CINCINNATI, CHICAGO AND ST. LOUIS RAILWAY COMPANY v. SHEPPARD.

Supreme Court, Ohio, February, 1897.

LIMITING LIABILITY BY SPECIAL AGREEMENT. — It is the settled law of this State that a common carrier cannot by special agreement relieve himself from responsibility for his own negligence, nor limit his liability for losses resulting therefrom (1).

CONFLICT OF LAWS — CONTRACT MADE IN ANOTHER STATE — HORSES. — Where a railroad company receives live stock in another State under a contract there made to transport it to a designated place in this State, and, while the stock is being carried in this State, it is injured by the company's negligence, the rights of the parties in an action for damages for the loss are governed by the laws of this State, and not by those of the State where the contract was made.

EVIDENCE OF PEDIGREE OF HORSE — DAMAGES. — In an action to recover the value of a trotting horse, evidence of his pedigree and that some of his blood relations have a record for speed, is competent as affecting his value.

EVIDENCE OF RECORD OF TROTTING ASSOCIATION. — When such record is published by authority of a recognized trotting association,

1. See *Welsh v. Railroad Co.*, 10 Ohio St. 3; *Express Co. v. Backman*, Ohio St. 65; *Graham v. Davis*, 4 Ohio 28 Ohio St. 144; *Express Co. v. Schwab*, St. 362; *Railroad Co. v. Curran*, 19 53 Ohio St. 659, 44 N. E. 1135.

and the publication is accepted and acted upon by those interested in and conversant with such matters, as authentic and official, it is not error to admit evidence of the speed as shown by that record, but the testimony of a witness to information he claims to have obtained from the record is incompetent.

EXPERT EVIDENCE—CAR WHEELS.—One who for ten years has made car building his business and given especial attention to car wheels and their construction, is competent to give an opinion of the value of the hammer test as a means of discovering defects in car wheels.

WATSON, BURR & LIVESAY, and F. M. SACKETT, for plaintiff in error.

J. W. MOONEY, for defendant in error.

Harry D. Sheppard delivered to the Terre Haute & Indianapolis Railroad at a place called Lovington, in the State of Illinois, a car load of horses, the company agreeing to transport them over its line to Indianapolis, Ind., and to deliver them at that place to the plaintiff in error, for transportation to Columbus, Ohio. The contract with the first named company is in writing, and contains the following stipulation: "In case of any loss or damage, the liability of said company and of any connecting line shall not exceed \$100 per head." The horses were safely delivered to and received by the plaintiff in error, at Indianapolis, but, while being carried over its line, in this State, a defective wheel of a car in the train gave way, and one horse was killed, and others injured. One of the injured horses was a blood relation of the celebrated trotting horse, Jay Eye See. Sheppard brought this action in the Court of Common Pleas of Franklin county, against the plaintiff in error for damages for the company's negligence in causing his loss. The company denied that it was negligent and pleaded the stipulation in the contract above stated as a limitation on its liability, averring that the contract was made in Illinois, where, by the law of that State, such stipulation is valid. Issue was joined on the allegations of the answer, and evidence was introduced on the trial by both sides as to the law of Illinois on the subject at the time of the making of the contract. The plaintiff recovered a larger amount than that limited by the contract, and the judgment was affirmed by the Circuit Court. The railway prosecutes error here to obtain the reversal of both judgments.

The syllabus made by the court states the points decided. The judgment was reversed for error in permitting a witness to testify to information he claimed to have received from consulting the record of the trotting association.

Opinion by WILLIAMS, C. J.

**MOSS ET UX. V. PHILADELPHIA TRACTION
COMPANY.**

Supreme Court, Pennsylvania, March, 1897.

CHILD KILLED BY BEING STRUCK BY STREET CAR. — Where a child was struck and killed by an electric street car, some distance from a crossing, the allegation of negligence, in running the car at undue speed, was not sustained by the indefinite statements of witnesses, that it was going unusually fast, when it was shown that the car was stopped almost immediately after the child was struck.

APPEAL from judgment of Court of Common Pleas, Philadelphia County, granting nonsuit.

B. FRANK CLAPP and WILLIAM W. WILTBANK, for appellants.

J. HOWARD GENDELL, for appellee.

FELL, J.—It is unnecessary to consider whether, under the circumstances disclosed by the testimony, contributory negligence should be imputed to the plaintiffs in allowing their child to escape from the house, and wander in the street unattended, as we see nothing in the testimony which will sustain a finding of negligence on the part of the defendant company. A child three years and eight months old was playing on the street. When last seen by any of the witnesses before the accident she was jumping rope, and running across the street from one side to the other, and at some distance from a crossing. No witness called saw the accident. The car stopped almost immediately after the child was struck. The plaintiff's case rested upon the allegation that the car was run at undue speed. Of this the only evidence is found in vague declarations of the witnesses, who admittedly gave no attention to the car as it approached them. These witnesses speak of the car as "coming at a pretty full rate," "going unusually fast," and "almost as fast as it could." The two witnesses who undertook to state how many miles per hour it was going admitted on cross-examination that their estimates were the merest conjecture, that they paid no attention to the movements of the car except to notice that it was coming down the street. They had seen the child playing on the street, and their attention was next arrested by the stopping of the car. The accident did not occur at a crossing. There is no evidence that the motorman was not giving close attention to his duties, or that the child could have been seen by him in a position of danger, until the moment of the accident; and the evidence

is clear that the car was stopped almost instantly after the child was struck. In *Woeckner v. Motor Co.*, 176 Pa. St. 451, 35 Atl. 182, cited by the appellants, the motorman saw the child approaching the track, and knew of the danger in time to guard against it. He went on after he could have stopped, assuming that the child would not cross the tracks. In this case there is not the slightest evidence of want of care on the part of the motorman either before or after the child was seen by him. No inference of negligence can be drawn from the indefinite statements of the witnesses as to the speed of the car which is not repelled by the fact that the movements of the car were under such complete control that it was stopped at once. The judgment is affirmed.

SHERIDAN v. TOWNSHIP OF PALMYRA.

Supreme Court, Pennsylvania, March, 1897.

BRIDGE ERECTED OVER STREAM BY TWO TOWNSHIPS.—The act of June 13, 1836, sec. 46, providing a mode for building bridges over streams upon the line between two counties, affects county bridges only, and townships may build bridges themselves, and each may build and keep in repair so much of the structure as lies within the township, as any other township road or bridge is built.

DEATH CAUSED BY FALL OF BRIDGE.—Where such a bridge is built each township is liable for the negligence of its own authorities, in the care of its own end of the bridge, and consequently for the death of a traveler, caused by the fall of the bridge over which he was driving.

APPEAL from judgment, Court of Common Pleas, Pike County, in favor of plaintiff in action for the death of her husband, caused by the fall of a bridge over which he was driving.

HY. T. BAKER, C. W. BULL, and H. WILSON, for appellant.

FRANK P. KIMBLE, O. L. ROWLAND, and F. M. MONAGHAN, for appellee.

WILLIAMS, J.—The bridge by the failure of which the plaintiff lost her husband was over a stream that had been designated by law as the line between the counties of Wayne and Pike. The road running over it connected the township of Palmyra, Pike county, with the borough of Hawley, in Wayne county. A pier near the middle of the stream was recognized as the boundary between them, and each district built and maintained the bridge from its shore to this pier, under an agreement with each other. The accident happened at the Palmyra end of the bridge. The township denies its liability,

on the ground that the act of June 13, 1836 (section 46), provides a mode for building bridges over streams upon the line between two counties, which must be pursued. This is true if the bridge is to be built at the expense of the adjoining counties as a county bridge, but not otherwise. It is competent for the people of the respective townships to build the bridge themselves, and, when they divide the bridge at a fixed point, each may build and keep in repair so much of the structure as lies within the township, as any other township road or bridge is built and repaired. Where this is done, as in the case before us, each township would be liable for the negligence of its own authorities in the care of its own end of the bridge. If this was not so, it might be important for every traveler, when approaching such a bridge, to leave his team, and make a journey to the county seat, to examine into the legality of the proceedings under which the bridge had been erected before venturing himself upon it. The question of negligence was for the jury, and was properly submitted to them. So, also, was the question of contributory negligence on the part of the deceased. The case was well tried by the learned judge of the court below, and the judgment is affirmed.

O'CONNOR v. SCRANTON TRACTION COMPANY.

Supreme Court, Pennsylvania, March, 1897.

CARRIER—PRESUMPTION OF NEGLIGENCE.—The question whether the presumption of negligence, arising from the happening of an accident to a railway car, whereby a passenger was injured, has been successfully rebutted or not, is for the jury.

APPEAL from judgment, Court of Common Pleas, Lackawanna County, in favor of plaintiff.

HORACE E. HAND and EVERETT WARREN, for appellant.

JOSEPH O'BRIEN and JOHN P. KELLY, for appellee.

PER CURIAM.—The principal question raised by this appeal, is presented most distinctly by the first assignment of error. The defendant's counsel, by their sixth point, had asked the court to instruct the jury that the presumption of negligence arising from the happening of an injurious accident to the vehicle employed for the carriage of passengers, resulting in injury to a passenger, is successfully rebutted by proof that the track was in good order and repair, the car in perfect repair, and the management and operation careful and skilful. The learned judge did not in so many words

affirm or deny the doctrine of the point, but he told the jury that the question as to whether the presumption of negligence had been successfully rebutted or not was for them to determine. This, while not a categorical answer, submitted the question to the jury as one of fact. The question was for the jury (*Sullivan v. Railroad Co.*, 30 Pa. Sup. 234); and no injustice was done by the form of the answer. We see nothing in the record to require us to interfere with this judgment, and it accordingly is affirmed.

JAGGER v. PEOPLE'S STREET RAILWAY COMPANY ET AL.

Supreme Court, Pennsylvania, March, 1897.

ALIGHTING FROM MOVING STREET CAR. — A passenger attempting to alight from an electric car, moving at the rate of from four to five miles an hour, is guilty of contributory negligence as matter of law.

MASTER AND SERVANT. — The practice of defendant's employees of slackening the speed of an electric car, to enable a certain passenger to alight at a point where, ordinarily, no stop was made, is not binding upon the railway company.

APPEAL from judgment, Court of Common Pleas, Lackawanna County, directing compulsory nonsuit.

CHARLES L. HAWLEY, for appellant.

HORACE E. HAND, for appellees.

PER CURIAM. — The plaintiff, in going from the business part of the city of Scranton to his home, used the defendant's line of cars. To shorten his walk, he was in the habit of leaping from the cars at a point where they did not ordinarily stop, from which point he walked to his home. It is alleged that the conductor and motorman knew of this habit, and, at a signal from him, would slacken the speed of the car down to about four or five miles per hour, in order to relieve him from the dangers incident to this mode of alighting as much as they reasonably could. The company was not bound by this practice of the plaintiff, nor by the good nature of their employees. It is the duty of the street railway company to stop its cars at suitable places for passengers to leave them, and remain stationary long enough to enable them to do so safely, *Crissey v. Railway Co.*, 75 Pa. St. 83 (1), and it is contributory negligence to

1. *Crissey v. Hestonville, etc.*, R. R. Co. 75 Pa. St. 83, is reported in 6 Am. Neg. Cas. 269.

leap from a moving car. *Railway Co. v. Aspell*, 23 Pa. St. 147 (1). To justify such action, the motion must be so inconsiderable that a person of reasonable prudence, exercising ordinary care, would not hesitate about the safety of the attempt to alight. *Stager v. Railway Co.*, 119 Pa. St. 70, 12 Atl. 821 (2). If the evidence leaves the question whether the car was fairly in motion in doubt, then the question of contributory negligence must go to the jury. If it does not, it is a question of law. This case, upon all the evidence, belongs to the latter class. Whether the attempt to leap from an electric car moving at the rate of from four to five miles per hour is contributory negligence in the passenger may properly be declared by the court, on a motion for a compulsory nonsuit, and it was properly declared in this case.

The judgment is affirmed.

RUDGEAIR v. READING TRACTION COMPANY.

Supreme Court, Pennsylvania, March, 1897.

ASSAULT BY MOTORMAN.—A motorman who jumped off his car and assaulted the driver of a wagon that was obstructing the track, was not acting within the scope of his employment, and the company was not liable.

See Note at end of this case on Liability of Master for Malicious Acts of Servant.

APPEAL from judgment of nonsuit, Court of Common Pleas, Berks County, in action by plaintiff to recover damages for an assault and battery committed by defendant's employee.

The offer of testimony did not distinctly set forth the respective duties of the motorman for whose act the company was sought to be held responsible, or of the conductor, who was present in the car. It was not alleged that the conductor either ordered or directed the motorman to leave the car upon the occasion, or ordered or directed the motorman to leave his post of duty, to undertake to remove the wagon which was upon the tracks of the company ahead of him. The offer recites that the motorman jumped off his car, came up to the plaintiff's wagon, and said, "You Dutch s—n of a b—h! if you don't get off the track, I will knock you off," and thereupon reached for a piece of board about five feet in length which he took from the plaintiff's wagon; that then plaintiff jumped from the

1. *Penn. R. R. Co. v. Aspell*, 23 Pa. St. 147, is reported in 6 Am. Neg. Cas. 225.

2. *Stager v. Ridge Ave. Pass. R. Co.*, 119 Pa. St. 70, is reported in 6 Am. Neg. Cas. 304.

wagon, walked around to the side of his horse, and asked the motorman, "Why do you call me a s-n of a b-h?" while his wagon remained standing upon the track of the defendant company, whereupon the motorman took the piece of board and struck the plaintiff in the jaw, knocking him down. In response to a question asked by the court it was ascertained it was not alleged that there was any order given by the conductor in charge of the car to the motorman to remove the wagon from the track.

ROTHERMEL BROS., for appellant.

RICHMOND L. JONES, for appellee.

PER CURIAM.—The testimony in this case shows that plaintiff was assaulted on the street, and beaten by John Van Reed, an employee of the traction company, defendant; but it clearly appears that in the commission of the assault and battery, Van Reed was not acting within the scope of his employment as a motorman of the company, or by the authority or direction of any of its officers or agents. The principle "*respondeat superior*," has no application to such a purely personal trespass as that disclosed by the evidence in this case. The court was, therefore, clearly right in refusing to take off the nonsuit.

Judgment affirmed.

NOTE ON SOME RECENT CASES OF LIABILITY OF MASTER FOR MALICIOUS ACTS OF SERVANT.

Railroad company liable for misconduct of engineer in maliciously blowing off steam and frightening horse. *Cobb v. Columbia & G. R. Co.* (So. Car.), 15 S. E. Reporter, 878; *Texas & P. Ry. Co. v. Scoville*, 10 C. C. A. 479.

Railroad company not liable for malicious assault of its surgeon upon an assistant. *Campbell v. Northern Pac. R. Co.* (Minn.), 53 N. W. Reporter, 768.

Master liable though servant exceeds his authority. *St. Louis I. M. & S. Ry. Co. v. Hackett* (Ark.), 24 S. W. Reporter, 881, 58 Ark. 381.

Railway company not liable for assault by brakeman upon trespasser. *Texas & P. Ry. Co. v. Black* (Tex.), 27 S. W. Reporter, 118.

Proprietor of theater responsible for act of special officer appointed by police commissioners but paid by proprietor. *Dickson v. Waldron* (Ind.), 35 N. E. Reporter, 1.

Railroad company not liable where person while riding free under arrangement with train hands was pushed off by them while they were trying to rob him. *Ala. & V. Ry. Co. v. McAfee* (Miss.), 14 Southern Reporter, 260.

Defendant liable for acts of its servants in breaking into plaintiff's house that defendant agreed to guard. *William v. Brooklyn Dist. Tel. Co.* (N. Y.), 12 Misc. Reports, 565.

Railroad company not liable for acts of foreman in discriminating against employees who traded at plaintiff's store. *Graham v. St. Charles St. R. Co.*, 47 La. Ann. 1656.

Railroad company not liable for punitive damages on account of assault on passenger by conductor. *Warner v. Southern Pac. Co.*, 113 Cal. 105.

The employer of a foreman who prints and delivers questions of a libelous character to witnesses on a trial is liable to the person libeled. *Youmans v. Paine* (N. Y.), 86 Hun, 479.

Street railway company liable for wrongfully ejecting passenger. *Burns v. Glens Falls, etc. R. Co.* (N. Y.), 4 App. Div. 426.

Master liable to proprietor of butter and cheese factory for act of servant in delivering milk that he adulterated unknown to the master and to spite him. (Ohio) 45 N. E. Reporter, 634.

BITTING v. TOWNSHIP OF MAXATAWNY.

Supreme Court, Pennsylvania, March, 1897.

TOWNSHIP BRIDGE WITHOUT GUARD RAILS—TRAVELER FALLING OFF AND KILLED.—Where a man, in the night-time, drove over a bridge that had no guard rails on either side, and when his wagon was six feet off the bridge on the further side, he swung a lantern from the side of the wagon and the horse began to back, and backed until the center of the bridge was reached, when he backed the wagon off and all went into the stream and the man was killed, the questions of negligence were for the jury.

APPEAL from judgment, Court of Common Pleas, Berks County, in favor of plaintiff in action for death of husband.

The following are the facts given on the former trial as reported in 177 Pa. St. 215.

Forming part of one of the highways of Maxatawny township, a stone bridge about nineteen feet in width and twenty-six feet in length crosses a mill race sixteen feet wide, the distance between the top of the bridge and the bottom of the stream being four feet six inches. There are no guard rails at the sides of the bridge. On the evening of November 22, 1894, plaintiff's husband drove over the bridge at a trot, holding the reins in the right and a lighted lantern in the left hand, slightly above the dasher. When the hind wheels of his wagon were about six feet beyond the bridge, he extended his left hand, with the lantern, over the side of the wagon, and immediately the horse stopped and backed, forcing the wagon back upon the bridge. When in this way the middle of the bridge had been reached, the horse turned so as to put itself and the team in a position transverse to the length of the bridge, and continuing to back and rear, threw plaintiff's husband, the wagon and itself, backwards over the right side of the bridge into the stream. Plaintiff's husband fell under the wagon and the horse, and was killed. On the rule for a new trial of the present case the only matter relied upon at the argument in support was the circumstance that according

to the testimony of one of the plaintiff's witnesses, the deceased after crossing the bridge not only held out his lantern, but swung it and that immediately his horse stopped, etc. It is claimed that on the basis of this evidence, which was not given at the first trial, it became the duty of the court to instruct the jury that the deceased had been guilty of contributory negligence, and that his widow could not recover.

ERMENTROUT & ROHL and D. NICHOLAS SCHAEFFER, for appellant.

J. H. JACOBS and H. P. KEISER, for appellee.

PER CURIAM.—The only assignment of error in this case is the refusal of the court below to direct a verdict in favor of defendant. When the case was here last year on plaintiff's appeal from the refusal of the court to take off the judgment of nonsuit we held that the evidence adduced on the former trial was sufficient to carry the case to a jury and the judgment was accordingly reserved with a *procedendo*. While the evidence on the last trial may have differed slightly from that on the first trial, there does not appear to be any such difference as would have justified the court in entering a judgment of nonsuit on the last trial. The learned trial court evidently thought so, and the case was accordingly tried on the lines indicated in the opinion referred to. 177 Pa. St. 213. We think, moreover, that this case is ruled in principle, at least, by *Yoders v. Township*, 172 Pa. St. 447. There is nothing in the specification of error that calls for further comment.

Judgment affirmed.

LEIDY v. QUAKER CITY COLD STORAGE AND WAREHOUSE COMPANY.

Supreme Court, Pennsylvania, March, 1897.

BAILMENT—WAREHOUSEMAN—COLD STORAGE—Where it was shown that when the poultry was put in cold storage it was in good condition; that it was molded and decayed when taken out; that there was dampness and moisture in the room where the poultry was stored, and that this would cause mold, and mold would cause decay, the warehouseman was liable for the loss, without proof of some specific act of negligence which produced the dampness or moisture.

APPEAL from judgment Court of Common Pleas, Philadelphia County, in favor of plaintiff.

WILLIAM V. PORTER, FREDERICK J. GEIGER, and GEORGE Q. HORWITZ, for appellant.

FREDERICK R. REEVES and JOHN G. JOHNSON, for appellee.

The principal facts of the case are not in controversy; that is, the fact that the plaintiff did deliver to the defendant a large quantity of chickens and squabs in September, 1893, for preservation by means of cold storage, and the fact that when the goods were removed, in the early part of the year 1894, a very considerable part of them were seriously injured by mold and decay, are well established by ample testimony, which is not contradicted. Whether the defective condition of the goods was due to the negligence of the defendant was for the jury to decide. The judge's charge committed nothing to the jury but the one bare question whether the loss and injury suffered by the plaintiff was occasioned exclusively by the acts or omissions of the defendant, while the articles were in its care and custody. The question was necessarily for the jury, and the court could not have affirmed the second, fourth and fifth points of the defendant, because they all contained requests for binding instructions to the jury to find for the defendant.

The only remaining question to consider is whether there was evidence more than a scintilla tending to establish the allegation of negligence against the defendant. We are constrained to say that in our opinion there was an abundance of such testimony in the cause. Some of plaintiff's witnesses describe the condition of the chickens when they were put in storage with Crowell & Class; some testify to their condition when taken out and removed to the defendant's storage; others to the condition of the goods when taken out and shipped to New York; others to the condition in respect of dampness and moisture observed in the defendant's rooms. One of the witnesses testified that the day when he was sorting, the dripping trough was wet and the pipes were damp and "rusty like" in the center of the room, and even the floor was wet. Another testified that he examined the room when looking over the stock and found the stock moldy and some of it rotten, and that the trough was damp and the pipes were dripping. It was abundantly proved that moisture would form mold and mold would cause rot. The condition of mold and decay of the chickens and squabs when taken out was proved by a mass of testimony which was really not contradicted. A number of witnesses proved the good condition of the stock when it was put into the storage, and the whole subject was fully developed in a large amount of testimony, from which the jury could fairly infer all the conditions of the defendant's liability. There was, of course, some conflicting testimony on the part of the

defendant, all of which was for the consideration of the jury, but of which we can take no cognizance. We do not think that it was necessary to prove some specific act of negligence which produced the dampness or moisture. The fact that, being present, they tend to cause mold, is itself evidence of negligence in permitting such conditions.

Judgment affirmed.

Opinion by GREEN J.

TEXAS AND PACIFIC RAILWAY CO. v. REEVES.

Court of Civil Appeals, Texas, January, 1897.

MEASURE OF DAMAGES FOR INJURY TO LIVE STOCK IN TRANSPORTATION.—In an action for injuries to horses shipped over defendant's road, evidence of their market-value in good condition at their destination, and evidence that they were unfit for the market upon their arrival, and that plaintiff had to keep them six weeks before he could sell them at any price, warranted a charge that submitted as the measure of damages the difference between their market-value in good and bad condition.

APPEAL from judgment District Court, Taylor County, in favor of plaintiff.

B. G. BIDWELL, for appellant.

JOHN BOWYER, for appellee.

Horses were shipped from Abilene, Tex., to Aiken, S. C., and were injured between Abilene and New Orleans. Appellee testified to the market-value of his horses in good condition at the place of destination, and was then permitted to state, over the objections of appellant, the highest prices he was able to get for them in a damaged condition after a persistent effort running through several weeks, and even months. He also testified that the injuries to the horses had the effect of rendering them entirely unfit for the market upon their arrival at Aiken, and that he had to keep them six weeks or two months before he could sell them at any price, doing all that he could in the meantime to put them in saleable condition. It is, therefore, contended that there was no evidence of the market-value of the horses in a damaged condition at the time of their arrival at Aiken, and hence that the charge, which submitted as the measure of damages the difference between their market-value in good and bad condition, was erroneous. But we are of opinion that the facts detailed by appellant in his testimony were of themselves competent, and sufficient to warrant the jury in inferring what must have

been the highest market-value of the horses in a damaged condition at the time they reached the place of their destination; and without disregarding this evidence, we do not see how they could have fixed the damages at a less amount than was assessed. It follows from this conclusion not only that the charge complained of was not misleading and damaging, but that the amount of the verdict, also complained of, was not excessive.

Judgment affirmed.

Opinion by STEPHENS, J.

FORT WORTH STREET RAILWAY COMPANY V. ALLEN ET AL.

Court of Civil Appeals, Texas, January, 1897.

STREET CAR TRACK—INJURY TO TRAVELER—CONTRACT BETWEEN CITY AND RAILWAY COMPANY.—Where a traveler was injured by being thrown from a wagon, caused by the wheel of the wagon coming into contact with a car-track rail that protruded above the grade of the street that the railway company had contracted with the city to keep in repair, the city was liable, but was entitled to judgment against the railway company.

LIABILITY OF STREET CAR COMPANY.—A street car company that took possession and enjoined the city from tearing up the tracks of a line abandoned by the receiver of the lessee of the company's other lines, was liable for an injury occasioned by its failure to repair the street when it had contracted with the city to repair.

LEASING LINE TO ANOTHER COMPANY.—A street railway company having built its line upon condition of keeping the streets used in repair, cannot release itself from its obligation by leasing its line to another company.

THIS was an action for injuries sustained by Benjamin Allen, the appellee, in being thrown from his seat on a delivery wagon, the wheel of which came in contact with the rail of a street car track owned by the Fort Worth Street Car Company, and that stood above the surface of the street from one to four inches. The suit was brought against the city, which pleaded by way of cross action, against the Fort Worth Street R'y Company, the North Side Railway Company, and N. Harding, receiver of the latter company, that if it (the city) was liable, then the Ft. Worth Company was liable to the city, as the city had granted the right to operate the street car line upon the express condition that the Ft. Worth Company should keep all street crossings along the line of its track in

repair, and that the roadbed and eighteen inches on either side of the rails should be paved with Telford-macadam, and that if the city was not entitled to recover against the Ft. Worth Company by reason of its leasing its lines to the North Side Company, then it set up the same causes of action against the North Side Company, and N. Harding, the receiver. The Ft. Worth Company alleged in its plea that at the time of the accident, and for several years prior thereto, it was not operating any line of street railway and was not in possession of the line in question, the Jones street line. That the said line having been theretofore leased to the North Side Company, it was placed in the hands of a receiver, N. Harding, by the District Court, and was held by the court through said receiver, and if bound by the terms of said ordinance, said Ft. Worth Company had no power to carry out the terms thereof, nor to interfere in any manner with the possession of such receiver. The cause was tried by the court without a jury, and judgment was rendered in favor of plaintiff Allen, against the city for \$1,850 and costs, and like judgment rendered over against the appellant Ft. Worth Street Railway Company in favor of the city; but the court refused to give judgment in favor of appellant against the North Side Railway Company, or the receiver, but gave judgment in their favor for their costs.

The injury was caused by the negligence of the city of Ft. Worth and of the Ft. Worth Street Railway Company in failing to keep the street in proper and safe condition and in allowing the rails to protrude above the grade of the street. It was the duty of the city in the first instance to keep the street in repair and the Ft. Worth Company was under contractual relations to the city to do so. We approve the finding of the District Court that the appellee was not guilty of contributory negligence under the circumstances, in endeavoring to cross the tracks to reach the point where he was to deliver his load of goods. The Ft. Worth Company did not lay its track and eighteen inches on each side in Telford-macadam, but laid it in common gravel. Gravel wears away quicker and leaves the rail standing up above the surface of the street. The street commissioner of the city had repeatedly given the Ft. Worth Company notice to repair the roadbed and street along its track on Jones street, but it failed to do so, nor did it require the receiver to repair.

The complaint of appellant that this line of street railway was in the hands of a receiver at the time of the injury, and had been for about two years, and that in consequence thereof it could not repair, is not sustained by the facts; the uncontradicted testimony of the receiver being that soon after he was appointed receiver, which was in December, 1891. he abandoned the Jones street line, and never

had anything more to do with it, and appellant, by injunction suit in its own name, had prevented the city from tearing up the track and putting the street in proper repair from March 19, 1890, until May, 1893. It accepted the privilege of building the line on the street, upon certain conditions, and, having built its line upon such conditions it could not release itself from the obligation of performing those conditions by leasing its line to another company, whether that company was solvent or insolvent. It should not have put it beyond its own power to perform those conditions by parting with the possession and control of the line; and, having done so, it is idle to contend that it thereby released itself from liability to the city, unless it showed the city's consent to such proceeding.

Judgment affirmed.

Opinion by HUNTER, J.

TEXAS AND PACIFIC RAILWAY COMPANY V. JONES ET AL.

Court of Civil Appeals, Texas, January, 1897.

INSULTING PASSENGER — MENTAL SUFFERING.— Where the wife of a station agent, in his hearing, and without any attempt on his part to interfere, addressed abusive language to a woman who was in the waiting-room intending to become a passenger, the railroad company was liable for the mental suffering caused thereby.

CARRIER AND PASSENGER — PURCHASE OF TICKET.— The presence of the woman in the waiting-room was notice to the company's agents of her intention to become a passenger, and the fact that she had not yet purchased a ticket was immaterial.

CHARGE.— It was not a charge on the weight of evidence, for the court to tell the jury that to charge the plaintiff with being indecent, or with having undressed before men, or with having stolen, was abusive and insulting.

APPEAL from judgment, District Court, Parker County, in favor of plaintiff.

B. G. BIDWELL, for appellant.

ALBERT STEVENSON, for appellees.

About forty-five minutes before train time appellee went into the waiting-room of appellant's station with some bundles which she placed on a seat and sat down by them. She intended to purchase a ticket and become a passenger on appellant's train. She was called across the street by a friend, and when she returned in about

fifteen minutes, found her bundles had been thrown out of the waiting-room on the platform. She inquired of the station agent's wife where her bundles were, and was told by the station agent's wife that she didn't know where they were, and didn't care, and abusive language was used, which is recited in the charge with other testimony offered by appellee. There was a verdict for appellee for \$450. Appellant complains of the charge as being upon the weight of evidence, and as submitting an improper measure of damages, contending that, unless there was bodily injury, no damage could be recovered for mental suffering. "If you find and believe that on or about the 5th day of April, 1892, J. E. Pitzer was the agent of defendant in charge of its station at Millsap; that the defendant had and maintained a depot for passengers at said point; that the said J. E. Pitzer was the agent of the defendant, and in charge of its said depot; that on said day the plaintiff, Jessie Jones, was in said depot for the purpose of taking passage on one of the trains of the defendant; that while the plaintiff was in said depot, waiting to take one of the defendant's trains, the wife of said agent, J. E. Pitzer did, in the presence and hearing of said J. E. Pitzer, abuse and insult plaintiff, Jessie Jones, by charging her, the said Jessie Jones, with being indecent, or with having undressed before men, or with having stolen scissors from the said Mrs. Pitzer; that the said J. E. Pitzer made no effort to protect the plaintiff from such insult; that the said J. E. Pitzer could, by the use of reasonable effort, have prevented such insult; that thereby plaintiff, Jessie Jones, was mortified and humiliated, and that she suffered mental pain or anguish, and that she was thereby made sick and suffered bodily pain, and was thereby damaged,—you will find for the plaintiff such actual damages as she sustained on account of such insult." We are of the opinion that the charge is not subject to the objections made. The language recited in the charge was plainly abusive and insulting language, and it was not a charge on the weight of evidence for the court to so treat it.

On her right to recover damages for mental suffering, we think it was the duty of the appellant's station agent to protect appellee from insult and abuse from all persons while she was at its station, waiting to become a passenger on its train, whether she received physical injuries or did not. *Leach v. Leach* (Tex. Civ. App.) 33 S. W. 703. In the *Leach* Case there was no bodily injury, but only the mental suffering of a virtuous woman consequent upon an unwarranted proposal for sexual intercourse. The right of a lady passenger to be secure from personal insult and abuse in the waiting-room of a railroad station, and the correlative obligation of the railroad

company, who has invited her there, to protect her in such right while there, is as clear in the one case as in the other. We also think that the agents of appellant were bound to legal notice of the fact that she was there with the intention of becoming a passenger, and that she was entitled to protection although she had not then bought her ticket.

Judgment affirmed.

Opinion by HUNTER, J.

DONOHUE v. TOWN OF WARREN.

Supreme Court, Wisconsin, February, 1897.

DEFECT IN HIGHWAY—THROWN OUT OF WAGON.—Where the plaintiff was injured by being thrown out of a buggy, one of the wheels of which had previously dropped into a ditch in the highway, throwing out the driver and causing the horses to run away, the ditch was the proximate cause of the injury.

EVIDENCE.—The fact that the place where the plaintiff was thrown out was not definitely shown, was immaterial, when it was shown that the defect in the highway, which caused the accident, was near the point designated in the complaint.

APPEAL from judgment Circuit Court, St. Croix County, in favor of plaintiff in action commenced by A. B. Keezer who died after judgment and continued by Charles Donohue, substituted as administrator. At the time of the accident Keezer was riding with one Joseph Allyn in a buggy, drawn by a span of horses driven by Allyn. It was evening and it was dark. While driving at a slow trot, the right wheel suddenly dropped into a ditch and Allyn was thrown out, losing the reins. The team became excited and started to run, and a little further on the left wheel dropped into a ditch and Keezer was thrown and his arm was broken. The team ran away. Both Keezer and Allyn were strangers to the road, and as the night was dark they could not identify the precise place of the accident. In the notice to the supervisors and in the complaint it is described as being "in the highway running between sections three and four in the town of Warren," and "at a point about four hundred feet north of the southwest corner of the northwest quarter of section three of said town of Warren." Near the point designated was a large gulley or ditch extending entirely across the highway, found by the jury to have been a foot and a half to two feet wide, and a foot to a foot and a half deep, and to have been there since the fall

before. It was shown by the evidence that the accident happened at about that point.

S. N. HAWKINS, J. W. BASHFORD and R. M. BASHFORD, for appellant.

W. F. McNALLY, for respondent.

NEWMAN, J. — The appellant's brief contains specifications of twenty-two errors claimed. Most are in the nature of criticisms of rulings of the trial court in the admission and exclusion of evidence and of the instructions given. None of the objections urged seem to be of controlling importance, or to affect the general fairness of the trial, and do not require examination in detail. On the argument two principal objections only were discussed. And they seem to cover all that is important in the case. They are: 1. "The place where the accident happened was not definitely shown, and the question was not fairly submitted;" and, 2. "The team was running away when the plaintiff was thrown out and injured, and the town is not, therefore, liable." If by "the place where the accident happened" is meant only the place where the plaintiff was thrown from the buggy and injured, it is of little importance. The important question is if the defect which caused the accident was in the highway, and so near to the point designated in the notice to the supervisors and in the complaint, as not to be in material variance from it. There was, indeed, abundant evidence to establish that there was a defect in the highway, very near to the designated point, where Allyn was thrown out, and where the team started to run, sufficient to have caused the accident, and sufficient to support the finding of the jury that that was its cause. And certainly, if the defect in the highway was the cause of the running away of the team, it may well be held to be the proximate cause of the plaintiff's injuries; for, while the town is not required to make its highways safe for teams which are in the condition of fright, and out of the control of their drivers, they are, nevertheless, liable for such damages as are the proximate consequence of a runaway which is caused by defects in the highway. *Kelley v. Town of Fond du Lac*, 31 Wis. 179. It would make no difference that the injuries to the plaintiff were received at some distance from the place of the defect which was the cause of the runaway. No material error is found in the case. The judgment of the Circuit Court is affirmed.

NASH v. CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COMPANY.

Supreme Court, Wisconsin, February, 1897.

KILLED WHILE COUPLING CARS—RISK OF EMPLOYMENT.—Where an experienced brakeman, who, while attempting to couple an engine to a car loaded with lumber that projected beyond the body of the car, and after reading a notice of warning of extra care being required in such cases, was crushed in the collision between the engine and the lumber, no recovery could be had for his death, though it appeared that the drawhead of the tender of the engine was shorter than others.

APPEAL from judgment Circuit Court, Juneau County, in favor of plaintiff.

H. H. FIELD, for appellant.

WINSOR & WINSOR, for respondent.

Action for death of deceased who was engaged in the employment of a brakeman on defendant's road. He was killed while attempting to couple an engine to a flat car that was loaded with timber that projected over the body of the car about even with the draft iron which was about ten inches below the car floor. The deceased got off the engine as it was slowly backing towards the car, and adjusted the link draft iron of the car. The safe way of making such a coupling is to stoop so that the body shall be below the timber. When the engine got near enough the deceased passed in to make the coupling, and stood erect and was crushed and killed. He was twenty-four years old and had been employed by defendant about two months. He had been similarly employed elsewhere. Cars were frequently loaded in defendant's train like this one. His attention had been specially called to and he had read a printed notice which was posted on all cabooses of freight trains and other places which notified them that extra care must be used to prevent being injured from the lumber projecting beyond end of car.

The claim of the plaintiff is stated in the brief as follows: "Respondent rests upon the statement that the death of Nash was brought about by the unusual and dangerous manner of loading the lumber car over the end in conjunction possibly with the fact of the short drawhead on the rear of the tender." The defendant's contention is that the death was from one of the ordinary risks of the employment. That is the only question. Sometimes questions

become clear by a recurrence to elementary principles. None others are involved here. The fact that the deceased was killed while engaged in coupling cars for the defendant does not alone make the defendant liable for his death. It is liable only in case it failed to perform some duty which it owed to the deceased. The deceased, by undertaking the employment, assumed all the ordinary risks of the employment as the business was in fact carried on by the defendant so far as they were obvious to persons of ordinary intelligence, judgment and discretion, or could be discovered by due attention. The defendant is not liable unless it exposed him to unusual dangers. The testimony does not sustain the plaintiff's claim that the manner in which this car was loaded was unusual. Besides his attention had been called to the printed notice of warning. Clearly this was one of the risks of his employment. It was not negligence to put cars loaded in that manner into defendant's trains. Having consented to serve in the way and manner in which the business was being conducted, an employee has no grounds of complaint even if reasonable precautions have been neglected. *Casey v. Railway Co.*, 90 Wis. 113, 62 N. W. 624, and cases cited; *Erdman v. Steel Co. (Wis.)*, 69 N. W. 993 (1). But it is said that the drawhead on the tender was shorter by several inches than the drawhead of ordinary freight cars, and that that might have misled him. It is suggested that with seven inches more of space between the end of the timber and the tender he might have come from the collision in safety, as if he could speculate upon such chances without the imputation of negligence. Doubtless he was for the moment oblivious of the danger attending the performance of the act he was about to perform. It was one of the risks of the employment which he assumed. A verdict for the defendant should have been directed. Judgment reversed.

Opinion by NEWMAN, J.

1. *Erdman v. Illinois Steel Co. (Wis.)* is reported in 1 Am. Neg. Rep. 199, *ante*.

EAN v. CHICAGO, MILWAUKEE AND ST. PAUL RAILWAY COMPANY.

Supreme Court, Wisconsin, January, 1897.

NEGLIGENCE OF CO-EMPLOYEES OF RAILROADS.— Under Laws 1893, ch. 220, companies liable to employees for negligence of co-employees.

A railway company is liable to a freight handler for injuries sustained through the negligence of the company's employees while he was pushing a car to the freight-house by direction of his superior.

ACTION FOR DEATH.— And where such freight handler was killed by such negligence his personal representatives may bring an action for his death under sec. 4255, Rev. Stats.

PLEADING.—Where a complaint has reference to an approach of cars from some point beyond a curve so located as to interfere with the view from the point where the deceased was at work, but there is no allegation that there was such a curve in fact, no allegation that other cars were moved upon the track where the deceased was working, it is fatally defective.

APPEAL from judgment, Superior Court, Milwaukee County, dismissing complaint in action by Alice Ean, executrix of George Ean, deceased.

ROGERS & MANN and GEORGE E. SUTHERLAND, for appellant.

C. H. VAN ALSTINE, for respondent.

Action to recover damages for the death of George Ean, caused, as alleged, by the negligence of defendant's employees. It is alleged in the complaint that the deceased was a freight handler in defendant's freight-house in the city of Milwaukee on November 14th, 1894, when the agent in charge requested deceased and three of his co-employees to move a car about three car lengths, so that it would be in front of the sixth door of the freight-house; that there was no engine in sight at the time and no cars were being moved in the vicinity; that deceased and one of his associates went between the car to be moved and another uncoupled them, and commenced pushing the former to its destination, when without giving any warning of the cars approach around the curve on the viaduct, then and there run into and struck the cars from which said deceased had aided to uncouple the car he was pushing, and thereby forced the string of cars upon said deceased, and run over him, and caused his mortal injury, of which he died November 19, 1894. It needs no discussion to demonstrate from the record in this case that if any negligence is alleged in the complaint as the proximate cause of the death of the testator, it was the negligence of an

employee of the defendant; hence no right of action exists in favor of the plaintiff, unless the deceased, had he lived, could have recovered damages for his injury of the defendant. It does not appear upon what ground the learned judge of the Superior Court sustained the demurrer *ore tenus*, but from the briefs of counsel we assume that his decision was based upon the ground, among others, that the deceased was not an employee entitled to the benefits of chapter 220, Laws 1893. That act received consideration in *Smith v. Railway Co.*, 91 Wis. 503, 65 N. W. 183; and no good reason appears to change in any way the conclusion there reached. The test in any given case is, Was the person injured employed in one of the branches of the railway service covered by the act at the time of the injury? If so, he is entitled to its benefits, whether such service was the principal kind of work to be performed by him under his contract of employment or a mere incident to his general duties. While actually engaged in moving the car the deceased was within the extraordinary perils which the act was designed to protect employees against. The conclusion of the trial court to the contrary cannot be sustained.

It was further held that even if the deceased would have been entitled to recover of the defendant had he lived, section 4255, Rev. St. has no application to such a case; hence no cause of action is stated in the complaint in favor of the plaintiff. Clearly the right of action in favor of the deceased was lost by his death. *Randall v. Telegraph Co.*, 54 Wis. 140, 11 N. W. 419; *McKeigue v. City of Janesville*, 68 Wis. 50, 31 N. W. 298. And as there is no statute giving a right of action to the personal representatives except section 4255, Rev. Stats., unless that applies the complaint is fatally defective. It will be observed that the statutes say that "in every such case the person who or the corporation which would have been liable if death had not ensued, shall be liable to an action for damages, notwithstanding the death of the person injured." To be sure the rule of strict construction should apply as the act is in derogation of the common law (*Eilers v. Wood*, 64 Wis. 422, 25 N. W. 440), if the language is open to construction; but in our judgment it is not. There is nothing either in the terms or the spirit of the act from which the court can say the legislative idea was to confine its effect to rights of action in favor of injured persons as the law existed on the subject at the time section 4255 was passed. We hold that section 4255 applies to the case, and that the ruling of the court to the contrary cannot be sustained.

A further question is presented of whether the complaint shows that the proximate cause of the death of the testator was negligent

conduct of defendant's employees while in the discharge of, or failure to discharge their duties as such. That part of the complaint relied upon as charging negligence is so involved that it is with considerable difficulty that we are enabled to analyze it satisfactorily. To aid in determining what is in effect alleged on the subject of negligence, we transpose somewhat the language of the complaint in that regard as follows: When the said defendant, without having given or caused to be given any warning of the approach of any cars, and without having any flagman or other servant there stationed to warn persons of their approach, either along the tracks or on the cars approaching, and without ringing any bell or blowing any whistle or having any person stationed at any place to warn persons of the cars approach around the curve at the viaduct upon said track, and without having any lawful or safe method of notifying said deceased of the approach of any cars or engine then and there by its servants, agents and employees in charge of and managing, conducting and running such cars, so carelessly managed, moved and conducted the same that by and through the carelessness, negligence and improper conduct of said defendant, by and through its said agents, servants and employees, did then and there noiselessly run into and strike with great force and violence the string of cars standing upon the track as aforesaid, forcing the same down and upon and over the said Ean, mortally injuring him, and causing his death. It will be observed that the failure to give warning or any signal of approaching danger has reference to an approach of cars from some point beyond a curve so located as to interfere with the view from the point where the deceased was at work. But there is no allegation that there was such a curve in fact; no allegation that any cars came from beyond the curve and struck the string of cars; no allegation that other cars were in fact moved upon the track or in the vicinity of the string of cars. Giving to the language of the pleading the most liberal construction it will reasonably bear, aided by all inferences that can be legitimately drawn therefrom, we are unable to sustain it as a concise statement of facts constituting a cause of action.

Judgment affirmed.

Opinion by MARSHALL, J.

NEW YORK ELECTRIC EQUIPMENT COMPANY
v. BLAIR.

U. S. Circuit Court of Appeals, Second Circuit, April, 1897.

INJURED BY PIPE FALLING FROM BUNDLE BEING HOISTED.—

Where it appeared that the plaintiff was struck and injured by a pipe that fell from a height, in an elevator shaft, where he was at work, and that the defendant was hoisting pipes that were tied together by a rope, twisted around them near the bottom of the bundle, and no bagging or canvas was placed around the lower ends, and the defendant's workmen had been warned of the danger of so hoisting the pipes, and that a bundle of pipes, just preceding the injury, passed upwards with one pipe projecting below the other pipes, the jury were justified in finding that the injury was due to defendant's negligence.

EVIDENCE—NOTICE OF DANGER.—Evidence that a witness, on the morning of the accident, told the workmen who were assisting in hoisting pipes on the ground floor that the proper way was to wrap canvas around the bottom of the bundles, for the purpose of holding the pipes fast, was properly admitted.

EXPERT EVIDENCE.—Evidence of an expert as to whether it was necessary, in hoisting pipes, to wrap canvas around the ends of the pipes, was properly excluded, as it was not a proper subject of expert evidence.

EVIDENCE.—The admission of objectionable testimony, without objection, waived any reversible error in the admission of subsequent testimony of the same character.

THIS is a writ of error to review the judgment of the Circuit Court of the United States for the Southern District of New York, which was entered upon a verdict in favor of the plaintiff for \$15,000, in an action brought to recover damages for severe personal injuries received by the plaintiff in consequence of the alleged negligence of the defendant's servants.

The accident occurred on April 1st, 1895, in the extension of a building on Elm and Leonard streets in New York City. The plaintiff was in the employ of Otis Brothers, constructors of passenger elevators, and was at work in elevator shaft No. 1, on a platform about six feet above the fourth floor. The defendant was equipping the building with electrical appliances, and its employees were hoisting iron pipes of ten feet in length and an inch in diameter, in bunches of six, from the first floor to the ninth floor in elevator

shaft No. 3. There were four shafts, which were apparently close to each other. The pipes in each bundle were tied together by a rope twisted around them near the bottom of the bundle and looped about them again towards the top. No bagging or canvas was placed around the lower ends of the pipes, and the coupling ends were intended to be placed at the top of the bundle, so as to form a sort of cone, with the larger end upwards. The plaintiff offered evidence tending to show that the defendant's workmen who were attending to this business, were warned to be careful and were told that the right way to raise the pipes was to roll canvas on the bottom of the bundle and make a hitch from the bottom and around the canvas; that a bundle passed the fourth floor in its upward ascent, with one pipe projecting below the other pipes, and its coupling end downwards; that a pipe forthwith came down the same shaft and struck a cross beam between the second and third shaft above the fourth floor; that this pipe struck the plaintiff, threw him to the fourth floor, broke his lower jaw, lacerated his scalp, and that permanent partial motor paralysis of the right side was the result, which will probably be progressive and entirely prevent his working again.

The defendant's testimony tended to show the safety of the method of securing the bundles, the care with which they were tied, and the improbability that a pipe fell from a bundle. The defendant also urged the inability of the plaintiff to prove that its pipe fell and inflicted the injury.

Upon the writ of error, the defendant relied much upon the alleged error of the trial judge in refusing to grant a motion, at the close of the testimony on both sides, to direct a verdict for the defendant upon the ground that the plaintiff's testimony presented no adequate question of fact to go to the jury, and that a cause of action had not been proven. The statement which has been given of the facts which the plaintiff attempted to show directly, or to have inferred from proven facts, is sufficient to indicate that he undertook to prove that his injury was occasioned by the negligent conduct of the defendant's servants and against which they had adequate warning. An examination of the record leads to the conclusion that the jury were justified in finding that the plaintiff had sustained the burden of proof which he took upon himself and in finding that his injury was caused by the undue and improper carelessness of the defendant's employees in attempting to hoist bundles of inadequately protected iron pipes to the ninth story of the building.

A witness for plaintiff testified that he notified the men who were hoisting the pipes of the necessity of care. Another witness testified that on the morning of the accident he told the men who were assisting in hoisting pipes on the ground floor that the proper way was to wrap canvas around the bottom of the bundle for the purpose of holding the pipes fast. The evidence of the first witness was properly admitted. *Brady v. Manhattan R'y Co.*, 127 N. Y. 46 (1). The defendant moved to strike out the testimony of the second witness because it did not appear that the conversation was with one of its employees. There was enough evidence to justify the conclusion that the person who was notified was not only not a volunteer workman, but was doing electrical work in the employment of the defendant. The defendant thereupon called a steamfitter and engineer of thirty-five years' experience in hoisting pipes and tying pipes in bundles and asked him this question: "Do you know whether it is necessary, in the proper performance of duty in hoisting pipe, that there should be bagging attached to the end of the pipe?" This was objected to and the testimony excluded. The witness could properly state the relative efficiency of different methods of hoisting pipe, but when he was asked to state whether it was necessary in the proper performance of duty to attach bagging to the end of pipes he was asked the question which the jury could determine upon a statement of simple facts. The province of expert testimony is well stated in *Schwander v. Birge*, 46 Hun, 66 (2). The expert testimony in this case was properly excluded. *Harley v. Buffalo Car Mfg. Co.*, 142 N. Y. 31; *Roberts v. N. Y. El. R. R. Co.*, 128 N. Y. 455.

The plaintiff called a physician who had qualified himself as an expert upon mental and nervous diseases, and had made three examinations of the plaintiff, who stated the character of the disease under which the plaintiff was suffering, that it would be with reasonable probability progressive, and that his mental power would also diminish. The defendant objected to the questions upon this subject, that they were incompetent and not part of the *res gestæ*.

1. *Brady v. Manhattan R'y Co.*, 127 N. Y. 46, is reported in 5 Am. Neg. Cas. 346.

2. "The governing rule declared from the cases, permitting the opinion of witnesses is, that the subject must be one of science or skill or one of

which observation and experience have given the opportunity and means of knowledge which exist in reasons, rather than descriptive facts, and, therefore, cannot be intelligently communicated to others not familiar with the subject, so as to possess them with a full understanding of it."

One question was objected to as immaterial, irrelevant and incompetent. The point is now made that the testimony was incompetent because competent testimony must be predicated upon facts explicitly stated and communicated to the jury. This objection is valueless for at least two reasons. The first is that the objection, when taken, did not state the particular fault which is now relied upon, and which, if stated at the trial, and if true, could easily have been obviated. The alleged error is a specimen of a practice not to be encouraged, which is to object with a rattle of words that conceal the real nature of an objection capable of being removed on the spot, and to announce its true character for the first time in the appellate court. See *Noonan v. Caledonia Mining Co.*, 121 U. S. 393. The alleged ground upon which the objection was based did not exist to any material extent. The circumstances of the paralysis might have been stated with more diffuseness, but the character and nature of the disease, which were ascertained, not by hearsay, nor by listening to the testimony, but by personal observation, were communicated to the jury. *Griswold v. Railroad Co.*, 115 N. Y. 61; *McClain v. Railroad Co.*, 116 N. Y. 459.

The plaintiff had testified, without objection, that before the accident he was getting \$2.25 per day, that his wife and two children, a boy and a girl, were dependent upon him for support and that he had no property. The next question: "How old is the little girl" was objected to and admitted. The plaintiff answered, "eleven years." Defendant cites *Penn. Co. v. Roy*, 102 U. S. 451. By the admission, with consent, of all the objectionable facts, which the *Roy* decision excludes, the defendant waived any reversible error in the admission of subsequent testimony of the same character. The remaining error which is assigned is the refusal of the court to charge the jury that the use or non-use of bagging by the defendant is not necessarily negligence, which the court properly declined to do. Judgment affirmed.

Opinion by SHIPMAN, P. J.

* FRANK DUDLEY TANSLEY appeared for plaintiff (defendant in error).

EDWARD C. JAMES, for defendant (plaintiff in error).

OAKES ET AL. V. MASE.

Supreme Court, United States, February, 1897.

RULING OF STATE COURT BINDING ON FEDERAL COURT.—Where the judgment of the Circuit Court of Appeals was based upon a state statute that was held to be void under the State Constitution by the Supreme Court of the State, pending an appeal to this court, such ruling by the State court was binding on this court in considering the appeal.

FELLOW-SERVANTS.—An engineer operating a locomotive on one train, and the conductor on another train of the same road are fellow-servants.

IN ERROR to the Circuit Court of Appeals for the eighth circuit. C. W. BUNN, for plaintiffs in error.

MR. JUSTICE WHITE delivered the opinion of the court.

The defendant in error, who was plaintiff in the trial court, sued to recover damages caused by an injury resulting in the death of her intestate, while serving as an engineer on an engine of the defendant company, in the State of Montana. After the cause was put at issue a jury was waived by a written stipulation, and it was submitted to the court for judgment on an agreed statement of facts. The facts stated established that the accident was caused by a switch negligently left open by the conductor of another train on the same road. The trial court, considering that the engineer on one train was not a fellow-servant of the conductor on another train of the same road, gave judgment for the sum of the damage, which was fixed in the statement of facts. On error to the trial court the Circuit Court of Appeals for the Eighth Circuit, although holding that the relation between the engineer on one train and the conductor on another was that of a fellow-servant, yet affirmed the judgment, on the ground that, by the statute law of Montana, the common-law rule as to the relation of master and servant was modified, hence the liability existed. 11 C. C. A. 63; 63 Fed. 114. The statute referred to is found in the Compiled Statutes of the State of Montana of 1887, and reads as follows:

“Sec. 697. That in every case the liability of the corporation to a servant or employee, acting under the orders of his superior, shall be the same in case of injury sustained by default or wrongful act of his superior, or to an employee not appointed or controlled by him, as if such servant or employee were a passenger.”

Pending this writ of error prosecuted to the judgment of affirmance, rendered by the Circuit Court of Appeals, the validity of the

statute of Montana upon which that court based its decree was drawn in question before the Supreme Court of the State of Montana, where it was held that the statute was void, under the Constitution of the State, because it applied only to domestic corporations, and, therefore, operated a discrimination against such corporations. *Criswell v. Railway Co.*, 44 Pac. 525. As this ruling of the court of last resort of the State of Montana interpreting the Constitution and laws of that State is binding here, the sole ground upon which the Circuit Court of Appeals rested its judgment is destroyed, and the only question remaining is, did the relation of fellow-servant exist between an engineer operating a locomotive on one train and the conductor on another train of the same road? That such relation did exist is no longer an open question in this court. *Railroad v. Hambly*, 154 U. S. 349, 14 Sup. Ct. 983; *Railroad v. Charless*, 162 U. S. 359, 16 Sup. Ct. 848; *Railroad v. Peterson*, 162 U. S. 346, 16 Sup. Ct. 843.

It follows, necessarily, that the judgment must be reversed, and that judgment be entered in favor of defendants, and it is so ordered.

TEXAS & PACIFIC RAILROAD COMPANY v. MANTON, ADM'R OF BLOOM.

Supreme Court, United States, January, 1897.

ACTION FOR PERSONAL INJURIES—DISCHARGE OF RECEIVER.—

An action for personal injuries against a railroad company, sustained during the operation of the road by a receiver is not barred by reason of the failure to present the claim within the time mentioned in an order discharging the receiver and restoring the property to the company without foreclosure, and that required all claims to be presented within a certain time or else they would be barred.

PRESENTMENT OF CLAIMS.—The fair interpretation of the order was that the court gave an opportunity to those who had claims to present them, before the receiver was discharged, but those who had not done so would cease to be entitled to resort to the Circuit Court in the equity suit and would be remitted to such other remedies as might be within their reach.

IN ERROR to U. S. Circuit Court of Appeals for Fifth Circuit.

JOHN F. DILLON, WINSLOW F. PIERCE and DAVID D. DUNCAN, for plaintiff in error.

JAMES G. DUDLEY, A. H. GARLAND and R. C. GARLAND, for defendant in error.

In January, 1889, one Bloom, describing herself as a resident of Lamar county, Texas, brought an action in the District Court of that county against the Texas and Pacific Railroad Company and John C. Brown, receiver of said company, claiming damages for personal injuries received while traveling as a passenger on said railroad. The railroad company and Brown, the receiver, respectively, filed petitions for the removal of the suit into the Circuit Court of the United States for the Eastern District of Texas. The District Court refused to grant the removal, to which ruling the defendants duly excepted. Pending the making up of the issue, John C. Brown, the receiver, died. The trial resulted in a verdict and judgment in favor of the plaintiff for the sum of \$6,000. The cause was then taken to the Supreme Court of Texas, where, for error of the District Court in refusing the petition for removal, the judgment was reversed, and the cause was remanded.

In June, 1893, the case came for trial in the Circuit Court of the United States and the plaintiff recovered a verdict and judgment for \$8,000, and on a writ of error that judgment was, on January 30, 1894, affirmed by the United States Circuit Court of Appeals for the Fifth Circuit. 23 U. S. App. 143, 9 C. C. A. 300, and 60 Fed. 979. The case was then brought on error to this court. The plaintiff, Bloom, having died, Charles Manton entered an appearance as her administrator. The plaintiff's original petition in the District Court of Lamar county disclosed that the injuries complained of were received in August, 1888, while the road was in the hands of John C. Brown, the receiver. The order directing the receiver to deliver the property in his hands to the railroad company was made on January 2, 1889, and directed that all claims against the receiver as such be presented and prosecuted by intervention prior to February 1, 1889, and if not so presented by that date, that the same be barred and should not be a charge on the property of the company. The points decided are stated in the syllabus.

Judgment affirmed.

Opinion by MR. JUSTICE SHIRAS.

JONES v. BRIM.

Supreme Court, United States, February, 1897.

CONSTITUTIONAL LAW — PROTECTION OF HIGHWAYS. — Section 2087 of the Comp. Laws of Utah which provides that any person who drives a herd of animals over a public highway, constructed on a hillside, shall be liable for damages done by such animals in destroying the banks or rolling rocks into the highway, does not deny to any such person the equal protection of the laws, nor deprive him of property without due process of law.

POLICE POWER. — The statute is within the police power of the State, as a reasonable regulation, incident to the right to establish and maintain highways.

IN ERROR to Supreme Court of Utah.

F. S. RICHARDS, for plaintiff in error.

P. L. WILLIAMS, for defendant in error.

This was an action brought originally before a justice of the peace in Utah to recover \$10 for damages resulting as alleged from the destruction of the banks on the side of and from rolling rocks into and upon a highway situated on a hillside, by defendant's band of sheep, while they were being driven upon such highway. The Supreme Court of the territory of Utah in reviewing the judgment of a District Court in favor of defendant, decided that the statute upon which the cause of action was founded was valid; that the petition stated a cause of action and remanded the cause. 11 Utah, 200, 39 Pac. 825. The Supreme Court afterwards affirmed a judgment of the District Court, entered for the amount claimed. The defendant brings error. The sole question presented for our consideration is whether section 2087 of the Compiled Laws of Utah, vol. 1, p. 743, is in conflict with the Constitution of the United States. The section reads as follows:

"Sec. 2087. Any person who drives a herd of horses, mules, asses, cattle, sheep, goats or swine over a public highway, where such highway is constructed on a hillside, shall be liable for all damage done by such animals in destroying the banks or rolling rocks into or upon such highway."

Plaintiff in error claims that the law in question deprives the class of persons mentioned in it of their property without due process of law, and denies to them the equal protection of the laws. The denial of the equal protection of the laws is asserted to consist in an unjust and illegal discrimination against persons who "drive

herds of horses " etc., " over a public highway where such highway is constructed on a hillside," by making them liable for damage done by them in using the highway, while all other persons are permitted to use it without liability. The fourteenth amendment of the Constitution referred to does not limit nor was it designed to limit the subjects upon which the police power of a State may be lawfully exerted. *Railway Co. v. Beckwith*, 129 U. S. 29, 9 Sup. Ct. 207. Embraced within the police powers of a State is the establishment, maintenance and control of public highways. *N. O. Gaslight Co. v. Louisiana Light & H. P. & M. Co.*, 115 U. S. 661, 6 Sup. Ct. 252. The legislation in question would clearly seem, therefore, to come within the narrowest definition of the police power and be properly classed as a reasonable regulation incident to the right to establish and maintain such highways. The statute is analogous in principle to the one considered in the case of *Railway Co. v. Matthews* (decided at this term) 165 U. S. 1, 17 Sup. Ct. 243, wherein it was held that a law of Missouri was valid, which made every railroad corporation owning or operating a railroad in the State absolutely responsible in damages for the property of any person injured or destroyed by fire communicated by its locomotive engines. The statute was manifestly not designed to impose a liability upon the owners of herds for damages occasioned by the mere passage of a drove of animals over a hillside road. If these herds were kept in the road, the banks would not be caved, or rocks rolled into the traveled way. The damage contemplated must, therefore, be occasioned by animals going outside the beaten roadway.

The statute being general in its application embracing all persons under substantially like circumstances, and not being an arbitrary exercise of power, does not deny to the defendant the equal protection of the laws. *Lowe v. Kansas*, 163 U. S. 81, 88, 16 Sup. Ct. 1031. So, also, as the statute clearly specified the condition under which the presumption of neglect arises, and provides for the ascertainment of liability by judicial proceedings, there is no foundation for the assertion that the enforcement of such ascertained liability constitutes a taking of property without due process of law.

Judgment affirmed.

Opinion by MR. JUSTICE WHITE.

**BROSLIN v. KANSAS CITY, MEMPHIS AND
BIRMINGHAM RAILROAD COMPANY.**

Supreme Court, Alabama, February, 1897.

EMPLOYEE INJURED BY DEFECTIVE BRAKE—PLEADING.—In an action by an employee to recover damages for injuries sustained by reason of defective brake, a demurrer was properly sustained to a count which failed to show that defendant had knowledge of plaintiff's relations with it or his duties growing out of those relations.

PLEADING.—It is not necessary for plaintiff, in his complaint, to negative his knowledge of defect or negligence causing the injury.

APPEAL by plaintiff from Circuit Court, Jefferson County. The facts appear in the opinion.

J. J. ALTMAN and WADE & VAUGHAN, for appellant.

WALKER, PORTER & WALKER, for appellee.

HEAD, J.—This is an action for personal injuries. It is very clear the first count of the complaint shows no such relation between the plaintiff and defendant as imposed liability upon the defendant for the injury complained of. The plaintiff was in the employ of the Turner Coal Company, who was engaged in getting and shipping coal on the line of the defendant's road. There was at Palos, where the coal company did business, a side or spur track, against which was the coal company's tipple, used for loading coal into the cars. The defendant would put cars on this side track, near the tipple, to be loaded. On the occasion of the injury the plaintiff was riding on one of these empty cars, a number of which were being moved on the side track to be stopped at the tipple. The plaintiff alleged that it was his duty to be and remain upon said empty cars while they were being switched, and to apply brakes to stop them under the tipple, where they were to be loaded with coal, and while in the discharge of this duty he applied the brakes, and that the brake he attempted to turn was defective, and instead of stopping the cars hurled him upon the track, and the wheels passed over his leg, whereby he lost his leg. The duty of the plaintiff, it must be taken, arose out of his contract with his employer; for there is no allegation that there was ever any agreement at all with the defendant, either by the plaintiff or the coal company, whereby it became plaintiff's duty to be and remain upon the cars and apply the brakes, and there is nothing in the count from which the slightest implication could arise that the defendant agreed on, assented to, or even knew of such an arrangement or duty; and, for aught that

appears, neither the defendant nor its servants knew that the plaintiff was upon the car in the performance of any such duties at the time of the injury. If it be supposed that the servants saw him there, there is nothing alleged imposing a duty upon them to treat him otherwise than as a trespasser. When the plaintiff's supposed duty to be there had its origin, or whether he had ever been there before the occasion of his injury, does not appear. In fact, there is nothing to show that the defendant or its servants knew, or ought to have known, anything about the plaintiff or his relations to the coal company, or his duties growing out of those relations. He was therefore in no position to complain of the defective brake.

The second, third and seventh counts are infected with the same infirmities. The demurrers to these counts were properly sustained. There were several amendments to the first and third counts made on a separate paper, directing the insertion of certain paragraphs between certain words as they occur in the original counts. The abstract so presents the original counts that it is impossible for us to know where these insertions should be made. We cannot, therefore, consider these amendments. Those amendments which are required to be added at the end of the first, second, third and fourth counts may be considered, but in doing so we find so far as the first, second, and third counts are concerned, they add nothing to their value.

The fourth count, like the first three, shows the relation of the plaintiff to the defendant was that of a stranger, but there are allegations which raise the question whether or not there was such knowledge and consent on the part of the defendant as implied invitation to the plaintiff, by the defendant, in the latter's interest, in the operation of its business, as a common carrier, as justified the plaintiff's presence upon the cars, and imposed a duty on the defendant to furnish to him reasonably safe appliances. There is no pretense in the fourth count that the plaintiff was in the employment of the defendant; hence that count can have no reference to the employer's liability act; yet the only ground of demurrer assigned to this count is that it is not alleged that the plaintiff did not know of the defect in the brake, or that he gave information of the same, if he knew it, as required by section 2590 of the Code. It is obvious that this ground of demurrer is entirely out of place. The court erred in sustaining it.

The fifth count is under the employer's liability act, alleging that plaintiff was in the employ of defendant, and counting on the negligence of defendant's servants having the management of the engine and cars, in running and switching said cars with a defective brake

on the spur or side track where the plaintiff was engaged in the performance of his duties. The only ground of demurrer assigned to this count is that above noted to the fourth count. We decided long ago that it was unnecessary for the plaintiff to negative in the complaint that he had knowledge of the defect or negligence causing the injury. That is a matter of contributory negligence, which must be brought forward by plea. * *Railway Co v. Bradford*, 86 Ala. 574, 6 Southern Rep. 90, and authorities there cited. We cannot pass upon the real merits of the fourth and fifth counts for the want of grounds of demurrer testing them. Reversed and remanded.

ALABAMA MINERAL RAILROAD COMPANY v. JONES.

Supreme Court, Alabama, February, 1897.

DEATH — DAMAGES.—In assessing damages, in action for death, the jury may take into consideration the probable duration of life, from the evidence offered, and it is error for the court to take the question from the jury.

COLLISION — NEGLIGENCE.—Where an employee was killed in a collision, the question as to negligence, in running cars closely together, was for the jury to determine.

APPEAL from judgment for plaintiff, rendered in the Circuit Court, Shelby County. The leading facts in the case are reported in the former appeal, 18 Southern Rep. 30. New questions upon the admission of evidence and instructions given and refused, are predicated for assignments of error in the present appeal.

THOMAS G. JONES, for appellant.

BROWNE & LEEPER and LONGSHORE & BEAVERS, for appellee.

The cause of action, as stated in the first count of the complaint, was that Scott, section foreman and superintendent of road repairs, in the exercise of such superintendence, negligently ordered and directed plaintiff's intestate and the other section hands to take the two lever cars over the river at once, and at a great rate of speed, and negligently stopped his car suddenly while it was in front of the other car, while both were going at a high rate of speed, and without first ordering the rear car to stop, or notifying those on it of his intention to stop the car he was on, causing the rear car to run into the front car, whereby plaintiff's intestate was knocked off the rear car and killed. That stated in the second count is that Scott, the defendant's section foreman, in charge of the two lever cars, the one running closely behind the

other, at a high rate of speed, negligently stopped the front car, suddenly, without notifying those on the car behind, by reason of which the rear car ran into the front car, whereby plaintiff's intestate was knocked off the rear car and killed. These allegations were put in issue by the general denial. And the defendant further defended upon a plea of contributory negligence on the part of the intestate, the gravamen of which was that he failed to grasp or hold to the lever or handle of the car on which he was riding (the rear car), as it was his duty to do, but stood at the rear end of the car, and was negligently looking up and down the river over which the cars were passing, or was looking backward without holding on to any part of the car, or the handle thereof, which was an unsafe and dangerous way of crossing said river and trestle on a moving hand car. Issue was joined on this plea.

The evidence was circumstantial as to what portion of the earnings of deceased were consumed in his own property, and hence what amount of pecuniary benefit the dependent next of kin enjoyed from such earnings. As a circumstance aiding the solution of this question, it was competent to show how many and what dependents there were, and their ages. Particularly, in view of the cautionary instructions given the jury by the court in reference to this proof, there was no error in the ruling. The authorities hereafter cited, touching the measure of damages, make a distinction between cases where the entire earnings are consumed in the support of the family and where a portion only is so consumed, leaving a surplus for accumulation; though it seems that in cases where there are dependent families, who are distributees, enjoying support from the earnings, and also surplus accumulations, the plaintiff, administrator, is not confined in his recovery to the amount of injury sustained by the loss of their support, but may recover the entire present value of the accumulations as well. The present record raises no question calling for any further explanation of this distinction, or how it operates, than is stated in *Trammel's Case*, 93 Ala. 350, 9 Southern Rep. 870, which gives the dependent family annual benefits. The writer's own views are that under the statute, which gives the right of action to the administrator for the benefit of all distributees alike, the measure of damages is the same in all cases, whether some or all of the distributees were dependent or not. The court, at the request of the plaintiff, instructed the jury that if deceased was, at the time of his death, in good health and of sober habits, and was forty-eight years of age, his expectancy of life was as much as eighteen years. This charge was an invasion of the province of the jury. In assessing damages, in cases like this, it devolves upon the jury, upon

consideration of all the circumstances bearing upon the subject, as disclosed by the evidence, to ascertain what the duration of the party's natural life would have been. There is no method of ascertaining it, as a positive fact. The period fixed, in any case, is necessarily an inference drawn from many conditions and circumstances. In the same case, different minds, of equal intelligence, might reach different conclusions. The tables of mortality, computed upon the experience of life insurance companies, which, being of such universal recognition, courts will judicially notice, are not conclusive that the life expectancy of any particular person, though in good health and of sober habits, should be declared to be the period they estimate. It may be stated as a fact generally known that in the system of insurance many conditions enter, as factors, in the determination of the hazards and duration of a person's life. Though good health and sober habits, at the time, prevail, there may be other physical infirmities creating extraordinary hazard; such, for instance, as heritable diseases in ancestors, undue relation of height to weight, and the like. Again, the occupation the party pursues is of weighty consideration,—whether or not involving extraordinary risk and danger. These may all be matters of evidence before the jury, in a given case, and it is for that body to draw the proper inference as to the real duration of the party's natural life. In the present case, not only the age, good health and sober habits, of the deceased were shown in evidence, but that he was pursuing an occupation attended with unusual dangers. The charge was bad, in that it withdrew that fact from the consideration of the jury, as well as because it made the court to draw the inference which it was alone the province of the jury to draw.

The measure of damages, in cases of this character, viz.; where the next of kin were dependents, and all earnings were consumed in the support of the family, will be understood by consulting the following authorities: *Railroad Co. v. Trammell*, 93 Ala. 350, 9 Southern Rep. 870; *McAdory v. Railroad Co.*, 94 Ala. 272, 10 Southern Rep. 507; *Bromley v. Railroad Co.*, 95 Ala. 397, 11 Southern Rep. 341; *Railroad Co. v. Markee*, 103 Ala. 160, 15 Southern Rep. 511; *Railroad Co. v. Hall*, 105 Ala. 599, 17 Southern Rep. 176. Charge 4, given for the plaintiff, seems to come within the rule, except that it omits, in one of its alternatives, to confine the recovery to the present pecuniary value, etc. It authorizes the recovery of the "present cash value, or the pecuniary value," etc. The defendant cannot complain of the basis of computation authorized by charge 6 given for the plaintiff.

The allegations of the first count of the complaint require proof that the foreman, Scott, stopped his car suddenly while it was in front of the other car, while both cars were going at a high rate of speed, either without first ordering the rear car to stop, or without notifying those on it of his intention to stop the car he was on. Both these alternatives are not required to be proven. The second charge requested by the defendant requires proof of the second alternative, though the first might have been proven. It was properly refused. The third charge requires proof of both alternatives, and hence is bad. If the defendant's fourth charge meets one of the above-mentioned alternatives, it does not the other. Nor does it meet the averment of the second count. It was properly refused. It was a question for the jury whether or not it was negligent for Scott to run two hand cars at the same time, in the manner in which these cars are shown to have been run, across the bridge. The defendant's fifth charge was therefore properly refused.

If the injury was caused by the sudden putting on of the brake by John Guy, we cannot say, as a matter of law, that the act of Guy was negligent or wrongful, and was not rendered reasonably necessary by the negligence of the foreman. That question was for the jury. The sixth charge was therefore properly refused. Nor are we able to declare, as matter of law, as charge 10 does, that it was negligent in deceased to have hold of the handle with one hand only. Charge 12 singles out a particular fact for the special attention of the jury, which justified its refusal. Charge 19 ignores the question whether the order or signal given by the foreman, under all the circumstances, involved negligence on his part. So charge 20 ignores the question whether the acts of John Woods therein stated were superinduced by a negligent order of the foreman. We think it cannot be stated, as a legal proposition, that if the foreman gave the signal for both the cars to check their speed at the same time, and that it was known by those on the rear car, and that Guy properly applied the brake in the usual and customary way, there was, necessarily, no negligence upon which a recovery for plaintiff might be based. Whether these facts, in view of other circumstances, involve sufficient notification, to those on the rear car, of the intention to stop, within the meaning of the second count of the complaint, and whether there was no negligence in the fact of giving such a signal under such circumstances, were for the jury to determine. Charge 24 was therefore properly refused.

Reversed and remanded.

Op.nion by HEAD, J.

KANSAS CITY, MEMPHIS AND BIRMINGHAM RAILROAD COMPANY v. LACKEY.

Supreme Court. Alabama. February, 1897.

EMPLOYEE INJURED BY TRAIN BACKING—PROXIMATE CAUSE.—

Where an engine was started before a passing train had cleared a crossing, and when the train cleared the crossing, it was backed without warning, and injured the fireman, the backing of the train was the proximate cause of the injury, and for which defendant was liable.

APPEAL from judgment rendered for plaintiff in the City Court of Birmingham. Plaintiff obtained a verdict for \$2,000.

WALKER, PORTER & WALKER and WALLACE PRATT, for appellant.
WILLIAM VAUGHAN, for appellee.

The fourth, fifth, and sixth pleas were interposed to the whole complaint (1). They attempted to set up contributory negligence

1. The defendant filed demurrers to the complaint upon the following grounds: 1. The allegations of said complaint do not show that the defendant omitted or violated any duty it owed the plaintiff in the premises. 2. The allegations of negligence in said complaint are but conclusions, the acts or omissions constituting such alleged negligence not being stated or enumerated. 3. The acts or omissions relied on by the plaintiff, for a recovery in said complaint, are not stated with sufficient certainty. 4. The allegations of carelessness and negligence, in said complaint, show the omission or violation of no duty, which the defendant owed the plaintiff in the premises. The court overruled the demurrers to the complaint, and the defendant filed the following pleas: Pleas numbered 1, 2 and 3, present the general issue. Pleas numbered 4, 5, 6, 7, 8 and 9, respectively, after alleging "that the plaintiff himself was guilty of negligence, that proximately contributed to his alleged injury," set out the manner in which plaintiff was

negligent, by the following averments. Fourth. "That the engine upon which plaintiff was a fireman, at the time, was run and moved forward towards the crossing of the Alabama Great Southern and the Columbus & Western Railroads, before it was known that the said crossing and the way there, was clear, or that the said crossing was unoccupied." Fifth. "That the engineer in charge of the engine, upon which the plaintiff was a fireman, at the time, ran and moved said engine forward, towards said crossing, before it was known that said crossing and the way there was clear." Sixth. "That the engineer, in charge of the engine upon which the plaintiff was riding, at the time, as a fireman, ran and moved said engine, without objection or protest on the part of the plaintiff, towards said crossing, when the plaintiff knew that the said crossing and the way there was not clear, and when the plaintiff knew that the said crossing was at the time occupied by the defendant's train."

on the part of the plaintiff, or on the part of the engineer in charge of the locomotive on which plaintiff was at the time he sustained the injuries complained of, assuming that plaintiff was responsible therefor. Whatever else may be said of these pleas, it is certain that they do not answer the count which avers that the "injuries were caused by the reckless, wanton, and intentional misconduct" of defendant's servants, etc.; and this consideration alone will suffice to justify the trial court's action in sustaining a demurrer to these pleas. Moreover, the gist of each of these pleas is that the plaintiff, or a person for whose acts he is assumed to have been responsible, caused the engine to be run towards the crossing of another railroad, without knowing that the crossing was clear or knowing that it was not clear. Granting this to be true, on the case fully developed by the testimony, it appears without conflict or adverse inference that the injury did not result from the fact thus alleged. This was the situation: Phillips was the engineer, and plaintiff was fireman, on an engine of the Alabama Great Southern Railroad, and in these capacities came on their engine just before the collision occurred to within sixty or seventy feet of the point where the track of another railroad company crossed that of the Alabama Great Southern Company, and there stopped. At this time defendant's train was standing on the other track a short distance from the crossing, while the cars composing it were being inspected for the purpose of being transferred to the Alabama Great Southern Company. Phillips, with his engine and crew, was there to receive these cars. To effect the transfer it was necessary for defendant's train to pass over and beyond the crossing. After the inspection had been completed, defendant's train did pass over the crossing, and after this the Alabama Great Southern engine went onto the crossing; but, before clearing it, the defendant's train backed suddenly, and without signals, against it, causing the injuries complained of. Phillips and plaintiff had no reason to apprehend that the other train would be backed onto the crossing. There was no occasion that it should be to effect the transfer which was the sole object in crossing the track of the Alabama Great Southern road. Now, it may be that, when Phillip's engine was started or moved forward towards the crossing, the rear part of defendant's train was still upon it, so that the crossing at that time was not clear or free from obstruction; but, if so, it was rapidly passing, and had entirely passed, leaving the crossing clear, before Phillips' engine reached it. For Phillips to move his engine forward in anticipation of defendant's train, at the time in motion over the crossing, getting past the crossing, and leaving it unobstructed by the time his engine reached

it, he knowing that it was the purpose of defendant's servants to go on to a point beyond the crossing, and there stop, might possibly be regarded in some aspect negligence on his part, inasmuch as defendant's train might have been stopped by some unforeseen accident before it cleared the crossing. But, conceding such conduct on the part of Phillips to have been negligent, abstractly speaking, nothing is clearer than that such negligence was not the proximate cause of the disaster. Defendant's train was not stopped on the crossing. There was no reason that it should be, and no intention on the part of defendant's servants to stop it there. The crossing was clear and unobstructed when Phillips' engine reached it, and, but for a wholly fortuitous and unlooked for circumstance, would have remained so while he was passing over it, and for all time so far as that train of defendant was concerned. The circumstance was that the engineer on defendant's train, after he had fully cleared the crossing, apprehending a collision with a train on another track which he was about to cross or run upon, and the approach of which was unknown to plaintiff and Phillips when the latter moved his engine onto the crossing, suddenly reversed his engine, gave it steam, and backed his train onto the crossing where Phillips and plaintiff were at the time passing on their engine. It is manifest on these facts that the cause of the collision lay not in the fact that Phillips moved his engine forward towards the crossing before defendant's train had entirely passed over it, but altogether in the wholly independent, disconnected, and unanticipated fact that defendant's train was thus again thrown back on the crossing,—a fact which was contrary to custom, and to the intention of defendant's servants in crossing over, and not only unnecessary to the accomplishment of the purpose for which it had passed the crossing, but subversive of that purpose, and one which neither Phillips nor the plaintiff was under any duty to anticipate. On this uncontroverted state of case, it requires no argument to demonstrate that the injury did not result from any obstruction that may have been on the crossing when plaintiff's engine was moved forward; that defendant could take nothing by its pleas setting up such obstruction and Phillips' and plaintiff's knowledge and negligence in respect of it; and that the trial court's action in sustaining the demurrer to pleas 4, 5, and 6 worked no possible injury to the defendant.

It is equally clear, and for the same reasons, that the charges given at the request of the plaintiff could not have prejudiced the defendant, since they are to this effect only; that the negligence of Phillips does not bar plaintiff's recovery. Now, whether plaintiff would have been chargeable with Phillips' negligence had it proximately

contributed to the injury is a question we need not and do not decide in this case; but that his recovery is not precluded by the only negligence of Phillips which there is any tendency of testimony to prove is clear, for that such negligence did not proximately contribute to the damnifying result.

Similarly, charges 6, 8, 9, 10, and 11 refused to the defendant relate to the supposed negligence of Phillips or the plaintiff in respect of moving their engine towards or upon the crossing. If there was such negligence, the remoteness of its casual connection with the injury rendered it an irrelevant and immaterial matter in the case; and the court committed no error in refusing these requests for instructions.

It may be that defendant's engineer was justified by the apprehension of a collision in front in backing his engine on the track of the Georgia Pacific road; but there was abundant evidence to afford an inference on the part of the jury that he might have escaped the danger in front, and at the same time have avoided a collision in the rear, by the exercise of due care and prudence in the manner of backing his train. The evidence showed that there was room on defendant's track, between the Alabama Great Southern and the Georgia Pacific tracks to amply accommodate this train, safely clearing said tracks at either end. Conceding, therefore, the right of defendant's engineer to reverse his engine, and back his train when he saw the Georgia Pacific train approaching, so as to recede from its track, it by no means follows that defendant was entitled to a verdict, as it sought to have the jury instructed by charges 2 and 7; and the court properly refused those instructions.

Charge 3 refused to the defendant was in the nature of an argument to the effect that, inasmuch as the evidence tends to show that some freight trains are equipped with air brakes, and some are not, that trains equipped with air brakes can be stopped in much less time and space than others, and that defendant's engineer did not know whether the Georgia Pacific train was so equipped or not, therefore he had a right to presume that said train was not so equipped, and that, acting upon that presumption, he was not negligent in reversing his engine in order to escape a collision of which there was danger if that train had hand brakes only, though, as matter of fact, it was equipped with air brakes, so that no danger of a collision really existed. All this was apt argument to the jury, but it was for counsel, and not the court, to lay it before them. The instruction, moreover, tended to mislead the jury from a consideration of the evidence tending to show that, although the defendant's engineer had a right to back his train, he was careless and negligent in the

manner of exercising this right, and to the conclusion that defendant was entitled to a verdict if its engineer had a right to assume that the Georgia Pacific train would collide with his unless he backed off its track, without reference to the inquiry whether he should have placed his train safely between the Alabama Great Southern and the Georgia Pacific tracks. The charge was properly refused.

There being evidence of negligence on the part of defendant's servants, having an immediate causal connection with the injury, and the defense of contributory negligence not being made good, the court very properly refused the affirmative charges asked by the defendant on the whole complaint, and separately on the first, third, fourth, fifth and sixth counts thereof.

Judgment affirmed.

Opinion by McCLELLAN, J.

WOODWARD IRON COMPANY v. ANDREWS (1).

Supreme Court, Alabama, February, 1897.

EMPLOYEE INJURED IN COLLISION—CONTRIBUTORY NEGLIGENCE.—In an action by an employee to recover damages for personal injuries sustained in a collision the question of contributory negligence is one of fact for jury to determine from the evidence.

APPEAL from judgment for plaintiff in the City Court of Birmingham.

JAMES E. WEBB, for appellant.

ARNOLD & EVANS and LANE & WHITE, for appellee.

The only defense possible to the defendant under counts 2, 3, and 6, on the evidence in this record, is that of contributory negligence on the part of the plaintiff in remaining without objection on the hand car when Neal caused it to be run into the smoke. Neal had charge and control of the car. Plaintiff and the other employees of the car were under his orders, and, in consonance therewith, propelled the car into the place of danger, and it may also be said that he had superintendence intrusted to him in respect of the car and its crew. It approached the smoke at a high rate of speed. The plaintiff was one of four men working at the levers, his place being at the rear of the car. Neal was on the front of the car, looking ahead, and one of the lever-men was directly in front of the plaintiff. The brake by means of which the car could be stopped

1. See *Woodward Iron Co. v. Hern-* ing out of the same accident as in the
don, case next reported, an action aris- case at bar.

was not near the plaintiff, and was in charge of another employee. Plaintiff had no authority to stop the car, or otherwise control it. He could not get off it without incurring great danger. There is evidence from which the jury might have inferred that plaintiff did not become aware of the dangerous condition of the track ahead until just before the car entered the smoke which constituted the element of danger. Under these circumstances, all that plaintiff could possibly have done would have been to request Neal to stop the car, and either take precautions against a collision in the smoke, or allow him (plaintiff) to get off. This he did not do; and his omission in this respect, coupled with his knowledge, if the jury found he had such knowledge, of the dangerous character of the place the car was running into, and of a custom to stop the car there when smoke covered the track, and take certain precautions against trains coming from the opposite direction, is made the real basis of two instructions requested by the defendant, to the effect that such failure, with such knowledge of the situation, was, as matter of law, proximate contributory negligence on his part, barring a recovery. These instructions, as also the affirmative charge on counts 2, 3, and 6 asked by defendant, on the theory that the evidence without conflict showed that plaintiff was guilty of contributory negligence, were, in our opinion, properly refused. Taking all the facts and circumstances bearing on the point into consideration, it was for the jury, and not the court, to say whether a man of ordinary care and prudence, brought suddenly to a realization of the danger, with, it may be, only a moment or two to conceive the situation and act upon it, accustomed, probably, to rely upon Neal, the foreman, and to obey him, would have asked or demanded of Neal that the car be stopped, and the usual precautions be taken, or he be allowed to get off. If the jury found that plaintiff knew sufficiently long before the dangerous part of the track was reached that smoke obscured it, and that it was not Neal's purpose to stop and send a flagman forward before entering the smoke, as seems to have been the custom, to have considered what he should do, and then failed to take any steps to avoid the danger, it may be that they should have sustained the plea of contributory negligence, if they found the other facts hypothesized in charges 12 and 16 to exist. But if they found that there was not such time and opportunity for consideration and action as a man of ordinary prudence would, under all the circumstances, have availed himself of, and sought to have the car stopped, they should not have sustained this plea. The true doctrine applying here is thus stated by Roberts and Wallace in their work on the Duty and Liability of Employers (page 177): "But where, by the negligence of the

employer, or those for whom he is responsible, the plaintiff has been suddenly placed in a position of extreme peril, and thereupon does an act which, under the circumstances known to him, he might reasonably think proper, but which those who have a knowledge of all the facts, and time to consider them, are able to see was not, in fact, the best, the employer cannot insist that, under the circumstances, the plaintiff has been guilty of negligence." "Perfect presence of mind, accurate judgment, and promptitude under all circumstances, are not to be expected," says James, L. J., in the Bywell Castle, 4 Prob. Div. 219, 222. "You have no right to expect men to be something more than ordinary men."

There was evidence from which the jury might have concluded that Ritchie was negligent in not giving the customary signals of the approach of his engine before entering and while in the smoke. It being, as we have seen, a question for the jury whether plaintiff was guilty of contributory negligence, the court properly refused the general affirmative charge for defendant on the whole complaint, and upon the first and fourth counts, as well as upon the second, third, and sixth counts, referred to above, as also, of course, the eighth charge to find for defendant on the plea of contributory negligence, if the jury believed the evidence.

Judgment affirmed.

Opinion by McCLELLAN, J.

WOODWARD IRON COMPANY v. HERNDON (I).

Supreme Court, Alabama, February, 1897.

EMPLOYEE KILLED IN COLLISION — PLEADING — CODE.— In an action to recover damages for death of an employee, due to negligent act of an engineer in defendant's employ, it is not necessary to allege that at the time of the injury such engineer was in discharge of his duties. (Code, § 2590, sub-section 5.)

PLEADING — CODE.— It is not necessary to aver name of person intrusted with superintendence of machinery, etc., of employer, in action to recover for injury to employee, caused by defective machinery, etc. (Code, § 2590, sub-section 1); but where negligence of such superintendent is charged, it is necessary to aver the name of such person. (Code, § 2590, sub-section 2.)

CONTRIBUTORY NEGLIGENCE.— Where there was conflicting evidence as to negligence of the deceased and of the engineer, the question of contributory negligence was one of fact for jury to determine.

1. See, also, Woodward Iron Co. v. action arising out of the same accident
Andrews, preceding case reported, an as in the case at bar.

APPEAL from judgment rendered for plaintiff in the Circuit Court, Jefferson County.

JAMES E. WEBB, for appellant.

ARNOLD & EVANS and LANE & WHITE, for appellee.

An engineer who is in the employment of a railway company, and in charge and control of an engine which he is at the time running over a track of the company, is *prima facie* in the discharge of his duties as engineer under such employment. Moreover, counts 23, 24, and 25 of the complaint pursue the language of the statute in the respect under consideration. Liability is by the act made to rest upon the employer for an injury resulting from the negligence "of any person in the service or employment of the master or employer, who has charge or control of any signal points, locomotive, engine, switch, car, or train upon a railway, or of any part of the track of a railway." Code, § 2590, sub-sec. 5. The court, therefore, properly overruled the demurrer to these counts which proceeded on the assumption that it was necessary for them to aver that the engineer was at the time of the injury in the discharge of the duties imposed by his employment.

The averment of negligence in the seventeenth count is not duplex, as insisted by the demurrer thereto. The negligence counted on is that of the person intrusted with superintendence in allowing or permitting trains to be run along a track obscured by smoke, without requiring precautions to be taken by those in charge thereof to warn persons on the track—other employees of defendant—of their approach. "Proper signals" and "other necessary means of precaution" to this end are but one and the same thing, viz.: the steps dictated by due care and prudence to give notice of the approach of trains which could not be seen because of the dense smoke. The other ground of demurrer to the seventeenth count is that the count which claims for the negligence of a person having superintendence intrusted to him by the employer, while in the exercise thereof, fails to aver the name of such person or that his name is unknown to the plaintiff. In *McNamara v. Logan*, 100 Ala. 187, 14 Southern Rep. 175, it was held to be unnecessary in a count under sub-section 1 of section 2590 to aver the name of the person intrusted by the employer with the duty of seeing that the ways, works, machinery, and plant of the employer were in proper condition. Through inadvertence, and because of not recalling at the moment the considerations upon which that ruling was rested, it was said in the opinion in *Railroad Co. v. Bouldin* (Ala.) 20 Southern Rep. 325, that a count under sub-section 1 of section 2590 should aver the name of the person charged with negligence in respect of the condition of the ways.

works, machinery and plant of the defendant. We are satisfied with the contrary ruling in *McNamara v. Logan*, *supra*, for the reasons there given, and the case of *Railroad Co. v. Bouldin*, *supra*, so far as it conflicts therewith, must be overruled. It was also held in the case last mentioned that a count going upon the negligence of a person intrusted with superintendence under the second clause of section 2590 should aver the name of such person; and upon the considerations which led to the rulings in the cases of *Railroad Co. v. George*, 94 Ala. 199, 10 Southern Rep. 145; *George v. Railroad Co.* (Ala.) 19 Southern Rep. 784, and *Railway v. Cunningham* (Ala.) 20 Southern Rep. 639, we now adhere to that view, and hold that the demurrer to the seventeenth count, for its failure to aver the name of the superintendent whose negligence is relied upon, or plaintiff's ignorance thereof, should have been sustained.

The first count charges that the engineer was negligent in failing to ring the bell or blow the whistle "when entering the smoke which covered the track." This averment finds support in the testimony of several witnesses, going to show that the only signal given at all was given when the engine was distant fifty yards or more from the smoke. The blowing of the whistle at such distance cannot, in any accurate sense, be said to be the giving of a signal of alarm "when entering the smoke." The court, therefore, properly refused to give the affirmative charge on this count of the complaint.

Other counts of the complaint rely upon the failure of the engineer to ring the bell, blow the whistle, etc., at short intervals, while passing through the dense smoke which covered and obscured the track for two hundred and fifty or three hundred yards, embracing the point of collision between his train and the hand car on which plaintiff's intestate was riding. Whether the engineer was remiss in this respect the evidence was conflicting. The question was, therefore, for the jury. There can, we think, be no doubt that such omission under the circumstances shown in the evidence, if the jury found such to be the fact, was negligence on the part of the engineer. And this negligence was not rendered innocuous by the mere fact that the hand car, entering from the opposite side, was in the smoke before the engine reached it. Notwithstanding such state of facts, it may well be that Neal and his companions might yet have escaped upon being warned of the danger threatening them by signals from the engine as it came meeting them through the smoke.

The issue of contributory negligence *vel non* was an important one on the trial, and the action of the court below on requests for instructions by the defendant presents for our consideration whether plaintiff's intestate was, as matter of law, guilty of negligence which

proximately contributed to his own injury and death. He was the foreman of the track men who were using the hand car, and as such had charge and control thereof when it was run into the smoke where the collision occurred. The place of the collision, its character, the uses to which the track along there was put, being within the yard of defendant, the distance from the scene of the accident to the point whence the train which ran over the hand car started, the location of the side track between said point and the smoke covering the track, on which the collision occurred, and, in short, a full description of the scene of the catastrophe, will appear from the report of the case. Having reference to that, we are now to declare the law of contributory negligence applicable to the several phases of the evidence as to the conduct of the intestate on the occasion of his death, or, rather, as to the situation with reference to which his conduct is to be measured, for there is no conflict or contrariety of evidence as to what the conduct of the intestate was. He went at great speed into the smoke without stopping to ascertain or assure in any way the safety of so doing. We do not doubt, in view of the uses to which the track at the time obscured by the smoke was put, the liability or likelihood of the presence of an engine there at any time, Neal's knowledge of the situation, etc., that his conduct in plunging headlong into this volume of smoke, extending for two hundred and fifty or three hundred yards along the track, and totally obscuring it, was negligence *per se*, and to be so declared by the court, unless his conduct is relieved in this respect by his proximity to the train which preceded him into the smoke. If there had been no such train, his duty was clear to stop his hand car before entering the smoke, and send a flagman forward through the smoke to prevent any engine or train coming down the track until the hand car had passed through the smoke. Failing this would be negligence as matter of law. On the other hand, it is, we think, equally clear that to have run a hand car into the smoke so closely behind a train as that the latter would perform all the functions of a flagman sent forward, and prevent another train from coming down the track before the hand car reached a place of safety, would not be negligence at all, nor any evidence of negligence. The real facts of the case seem to lie between these extremes. There was a train which preceded the hand car through the smoke, but the hand car was not sufficiently close behind the train as to get through the smoke before the train had taken a side track several hundred yards beyond the smoke, and thus made way for another train to come down on the main track into the smoke before the hand car had emerged from it. If the hand car was so far behind the train at the time the latter

entered the smoke as that there was time for said train, at the speed it was known by those on the hand car to be running, to reach and take the side track beyond the smoke, and for the other train to come thence down the track at the speed it was accustomed and required to run, that is, at the rate of only two or three miles an hour, and meet the hand car in the smoke, we do not hesitate to say that plaintiff's intestate was guilty of negligence which proximately contributed to his death in following the first-mentioned train into the smoke at such a distance behind it. The evidence as to the distance between the incoming train and the hand car following it at the time the former entered the smoke was conflicting; and there was evidence tending to show that the train which struck the hand car started down the track, from a point several hundred yards beyond the smoke; immediately the incoming train arrived and went onto the side track, and that it proceeded down the track and into the smoke at a speed of from eight to twelve miles an hour,—a great deal faster than it was accustomed and required to run along there. If the jury found this to be the fact, and, further, that but for this unusual rate of speed of the down-coming train the hand car would have gotten through the smoke and to a place of safety, or where a probable collision could have been foreseen and avoided, before the train entered the smoke, the question of negligence *vel non* on the part of the plaintiff's intestate in entering the smoke thus behind the incoming train was one of fact for the jury, and not one of law for the court. We would not say, as matter or conclusion of law, that the intestate was guilty of negligence proximately contributing to his death, if, knowing the usual rate of speed of the yard engine to be two or three miles an hour, he reached the smoke sufficiently near behind the incoming train to have gotten through it in time to avoid a collision with any train that might be coming down the track had such train moved at its customary speed. There might well be two opinions or conclusions upon that inquiry, on all the evidence in the case, and it was therefore for the determination of the jury.

It was error to refuse to give the following instruction asked by defendant: "If the jury believe from the evidence that, on the day plaintiff's intestate received his injuries, the smoke on and along by the coke ovens was so thick that the track opposite the upper half of the coke ovens could not be seen by persons on a hand car when it came to the lower end of the coke oven battery; and if they believe that the said Neal knew or was informed that the yard engine, in switching cars to and from the coke ovens, was liable to be or likely to be passing along through at any time of day, and

the hand car was so far behind the coal train as that the said Neal could not see it, and could not tell how far ahead of the hand car it was,—then the court charges you that it was negligence in said Neal to ride on said hand car through the said smoke, under the circumstances, without stopping and sending a flagman ahead to protect the hand car from collision with the yard engine."

Judgment reversed.

Opinion by McCLELLAN, J.

LAUGHRAN v. BREWER.

Supreme Court, Alabama, February, 1897

ACTION BY EMPLOYEE UNDER CODE.—In order to entitle an employee to recover damages for injury caused by negligence of a fellow-servant, it must be shown that the act or omission of the employee, complained of was done or made in obedience to the rules or instructions of the master. (Code, § 2590, subdivision 4.)

APPEAL from Circuit Court, Jefferson County.

SAM WILL JOHN, for appellant.

J. M. GILLESPIE and E. K. CAMPBELL, for appellee.

The third count of the complaint is drawn under subdivision 1, sec. 2590, of the Code. It alleges that the plaintiff, being in the employment of the defendant in his paint shop or mill, and while so employed was injured, etc., "which injury was caused by reason of defects in the condition of the works, machinery or plant used in the business of the defendant aforesaid, which defects were not known to plaintiff, and arose from, and had not been discovered or remedied, owing to the negligence of the defendant," etc. In *Railroad Co. v. Hawkins*, 92 Ala. 243, 9 Southern Rep. 271, touching the particularity of averment necessary to be averred in a count under this section and subdivision of the Code, it was said: "There is no reason, however, for requiring a greater degree of particularity in the averment of negligence under this statute, than is required with respect to any other negligence counted on for a recovery of damages; and the 'facts' to be alleged in either class of cases are little, if any, more than a mere conclusion of the pleader, leaving the factors which enter into and support the conclusions to be adduced in the evidence." And in *Railroad Co. v. George*, 94 Ala. 216, 10 Southern Rep. 145, approving what was said in *Hawkin's Case*, it was added: "An allegation, pursuing the words of the statute, or substantially the same, is sufficient, but this much is

required." *Railway Co. v. Bradford*, 86 Ala. 574, 6 Southern Rep. 90; *Railroad Co. v. Watson*, 90 Ala. 41, 7 Southern Rep. 813. A demurrer was improperly sustained to this third count. Thereupon, the plaintiff filed another count, numbered 6, which was an amendment of the third count, in which the defect in the machinery complained of was specified, a demurrer to which amendment was overruled. The plaintiff got or could have had, under this amendment, the benefit of all the proof he was entitled to under the third count. It imposed no additional burden. The sustaining of a demurrer to said count was, therefore, error without injury. Authorities *supra*.

The 4th, 7th, 8th, and 9th counts of the complaint were framed confessedly under subdivision 4 of said sec. 2590. The fourth count charges the injury to be the result of an "omission of the engineer in charge of the engine, which was then and there driving and running the machinery of said shop, * * * to obey the rules and regulations of the defendant made to govern and regulate the stopping and starting of said engine." The seventh charges it as "caused by reason of the omission of a person, to wit, the engineer in charge of the engine which drove said pulley, to obey the signals given him in accordance with the rules and regulations of the master or employer, the defendant," etc. The eighth charges it, as "caused by reason of the omission of a person in the service and employment of the defendant, to wit, the engineer in charge of the engine and pulleys and machines in said shop or mill, to let said engine stand still after being stopped till he received the proper signal to start said engine again, as by the rules and regulations of the master or employer, the defendant, he was required to do," etc. The ninth, that the injury was caused by the act of a person, to wit, "the engineer in charge of the engine which drove the machinery in said mill, through shafts, pulleys and belts, in starting up said engine, after he had stopped it, in obedience to a signal made him under the rules and regulations of defendant, and before he had received any signal to start said engine as required by the rules and regulations of the master, the defendant." At common law, the rule was, that for injuries proceeding from the personal fault or negligence of the master, he was under the same liability to his servants as to third persons towards whom he sustained no special relations; but he was not liable for injuries caused by the negligence or fault of other servants in the same employment, if the master had not been negligent in the employment of incompetent persons. The risks incident to the common employment each servant was presumed to have contemplated when he entered the service. *Railway*

Co. v. Smith, 59 Ala. 245; Smoot v. Railway Co., 67 Ala. 13; Stewart v. Railroad Co., 83 Ala. 495, 4 Southern Rep. 373; Railroad Co. v. Allen's Adm'r, 78 Ala. 502; Railway Co. v. Davis, 92 Ala. 313, 9 Southern Rep. 252; Railroad Co. v. Carroll, 97 Ala. 129, 11 Southern Rep. 803; Railroad Co. v. Thomas, 42 Ala. 672; Railroad Co. v. Woods, 105 Ala. 569, 17 Southern Rep. 41. The foregoing principle as to the employer's liability still prevails in this State, and he is not and cannot be made liable, under the employers' liability act, unless the case falls within one of the categories named in the five subdivisions of the said act. In each of these counts the negligence complained of was that of a fellow-servant of the plaintiff, and as we have said, it is admitted and insisted that the said counts are drawn and are good under subdivision 4 of said section of the Code. The provisions of said subdivision are, in substance, that the act or omission of the employee complained of must be done or made in obedience to the rules of the master. In other words, when the master commands or instructs, by rules and regulations and by-laws of himself, or in obedience to particular instructions given by any person delegated by him, with his authority in that behalf, and an employee obeys and carries out such commands or instructions, and injury is done thereby to a fellow employee, the master is liable. The statute has reference, by its terms, to the instructions of the master, and makes him responsible for them, and when he commands that an act be done or omitted to be done, and the servant obeys in doing the thing commanded to be done, or in omitting to do what he was ordered not to do, his obedience in either case is the act of the master, and if injury results he is liable; but, if the servant disobeys the instructions so given him, by doing something else that he was not instructed to do, or omits to obey instructions at all, and injury to his fellow-servant is the result, it is not the act or command of the employer that caused the injury, but the disobedience of the employee, and the master is not liable. He stands in such a case as he stood, and is liable, if at all, at common law, unaffected by the employers' liability act. In each of these counts, the averment is, in substance, that the injury was caused by the disobedience of the fellow-servant of the rule of the master, exactly opposite to the requirements of the statute to render him liable thereunder. Neither count states any cause of action under said subdivision 4, sec. 2590, Code. Lovell v. Iron Co., 90 Ala. 13, 17, 7 Southern Rep. 756.

Issue was taken on the pleas, demurrers to which were overruled, and trial had thereon. The minute entry as shown in the abstract, in reciting the verdict of the jury states it: "We, the jury, find the

issue in favor of the plaintiff." It then concludes with a judgment in favor of the defendant against the plaintiff for costs. The plaintiff appealed and assigned as grounds of error the rulings of the court sustaining the defendant's demurrers to the several counts of the complaint. There is no bill of exceptions in the case. The word "plaintiff" as used in the abstract of the verdict is, as appears, a clerical error, self-corrective, and should be read "defendant."

Judgment affirmed.

Opinion by HARALSON, J.

LOUISVILLE AND NASHVILLE RAILROAD COMPANY v. BERNHEIM.

Supreme Court, Alabama, February, 1897

FAILURE TO DELIVER GOODS—QUESTION FOR JURY.—In an action to recover damages for failure to deliver a case of clothing the question as to the proper place for delivery of goods shipped to a point other than a regular point on the line of defendant's road is for the jury to determine from the evidence.

APPEAL from Circuit Court, Escambia County.

THOS. G. JONES, for appellant.

RABB & STEVENS and PILLANS, TORREY & HANAW, for appellees.

MCCLELLAN, J.—The fact that Bernheim, Bauer & Co. insisted that the goods which the railroad, it is alleged, failed to deliver, became the property of Hughes, on their delivery to the carrier, at New York, and brought an action against Hughes for the price on that theory, is certainly not conclusive against the title they now assert to the property. Their understanding of the terms of the sale arising, perhaps, from the fact that it was their rule and custom to make sales f. o. b. at New York, though they sometimes sold for delivery at the point of destination, or, it may be, from the report or order of their traveling salesman, Prolsdorfer, was that the goods became the property of Hughes as soon as they passed into the possession of the carriers; and this was also Prolsdorfer's understanding of it. Upon this they sued Hughes for the price, and on the trial of that case Hughes testified the one way, and Prolsdorfer the other. The jury found for Hughes, and there was judgment accordingly. It is shown in this case that the sellers had no notice of Hughes' version of the transaction until he advanced it in evidence at the trial as a defense to their action against him. The present defendant was a stranger to

that suit, and is not helped or hindered in the present action by the result of it, nor by the fact that Bernheim, Bauer & Co. proceeded against Hughes for the price of the goods, except that it constitutes an inconclusive admission on their part that the property did not belong to them. That suit cannot amount to an efficacious and binding election by them in this case, for the reason that they were not acquainted with all the facts when they instituted it; they did not know that Hughes claimed that the goods were not to become his property until delivered to him at the point of destination; and for the further reason that the present defendant was not within the operation of any election they may have then made. It was not an estoppel upon them to maintain this suit, because the defendant was a stranger to that suit, and could not have been affected by the result of it. It lacked the mutuality essential to estoppel. Treating their conduct in prosecuting that suit as a mere admission that the goods did not belong to them, we have on one side of that issue this admission, made upon an imperfect knowledge of the facts and the testimony of Prolsdorfer, and on the other the testimony of Hughes. The jury had a right to find, in line with this admission of the plaintiffs and the testimony of Prolsdorfer, to the effect that title to the consignment passed into Hughes by the terms of the sale when the goods were delivered to the carrier at New York, or to believe the positive testimony of Hughes to the effect that, by the terms of the sale, the goods were to become his property only upon their arrival at the terminal point of the shipment, and it would do violence to the principles frequently declared by this court in respect of applications for new trials to hold that a verdict either way upon this evidence should be disturbed for want of support in the evidence. *Cobb v. Malone*, 92 Ala. 630, 9 Southern Rep. 738.

The other issue in the case, viz., whether the shipment was to Evergreen, Ala., or Crestview, Fla., likewise stood upon conflicting evidence, of such character as that the jury would have been fully justified in determining it either for the plaintiffs or the defendant; and their finding for the plaintiffs is not open to assault on a motion for a new trial. The evidence of witnesses on the trial tended to show that Crestview, Fla., and not Evergreen, Ala., was the shipping point for Lakeview, Ala., and the proper place for shipments for the latter place to be carried and delivered. If the jury found the fact in line with this tendency of the evidence they should not have found that the railroad company performed its duty in carrying the goods to Evergreen, even though the guide referred to in charge 2 designated that place as the railway destination of shipments to Lakeview. The carrier insures delivery at the proper

place, unless prevented by the act of God or the public enemy; and he, and not the shipper, must suffer from the mistakes of his agents, or of guide books upon which he relies, as to what is the proper place of delivery. Said charge (as also charge 1, on considerations already adverted to) was therefore properly refused.

Affirmed.

ST. LOUIS, IRON MOUNTAIN AND SOUTHERN RAILWAY COMPANY v. DE SHONG.

Supreme Court, Arkansas, February, 1897.

HORSES INJURED—MEASURE OF DAMAGES—INSTRUCTION.—Where horses were injured in transportation an instruction that the measure of damages is the difference in the actual cash market value of the animals injured immediately before and immediately after said injury was proper, and defendant was not prejudiced by omission to state in what market value should be determined where it was apparent that jury estimated market value of place of destination.

APPEAL by defendant from judgment for plaintiff rendered in the Circuit Court, Clark County.

DODGE & JOHNSON, for appellant.

SCOTT & JONES, for appellee.

De Shong brought this action against the St. Louis, Iron Mountain & Southern Railway Company. He stated in his complaint that the railway company entered into a contract with him on the 21st of March, 1893, and thereby agreed, for a consideration paid to the defendant, to safely and in a reasonable time carry twenty-four horses (a car load) from the city of St. Louis to the city of Texarkana, and to deliver them at the latter place to a connecting carrier for carriage to Tyler, in the State of Texas, their place of destination; that the horses were delivered to the railway company at six o'clock P. M. on the 21st day of March, 1893, but "were not delivered at Texarkana to the connecting carrier until ten o'clock P. M. March 24, 1893; that there was an unreasonable delay in the transportation of said stock from St. Louis to Texarkana; and that, during all the time said animals were being transported, they were confined in the car in which they were loaded, without water or being unloaded for exercise or rest, and without other food than that placed by plaintiff in the car at St. Louis; that thereby the said horses became, from their long, unreasonable confinement, feverish, resulting in crowding, pressing, and trampling one against the

other, causing the same to be damaged." The complaint then set up specifically the kind of injuries received, which consisted of bruises, scratches, and cuts upon the various horses in the car, and prayed for damages in the sum of \$600. A jury tried the issues of fact, and returned a verdict in favor of the plaintiff for \$400. The court rendered a judgment in his favor against the defendant for that amount, and the railway company appealed.

The following facts were proved by the evidence adduced at the trial: On the 21st of March, 1893, the appellee delivered to appellant, in St. Louis, twenty-four horses to be transported over its railway to Texarkana, and there delivered to a connecting carrier, to be forwarded to Tyler, Texas, their place of destination. They were loaded in a car of appellant, and left St. Louis at 8:05 o'clock P. M. on the 21st of March, 1893, and arrived at Little Rock, Ark., on the 23d. of March at 3:05 A. M. (when the train should have arrived at 7:35 P. M. on the evening before if it had been on regular time), and arrived at Texarkana at 3:15 on the afternoon of the 23d of March, 1893, and were unloaded into the stock yards at 3:30 of the same evening. They remained on the car from the time they were placed in it until they reached Texarkana, where they arrived in a damaged condition. There was evidence tending to prove that the damage was occasioned by the negligence of the appellant, and that the extent of it was as much as \$400, the amount of the verdict.

In the course of the trial the depositions of three witnesses were read as evidence to show that the horses arrived at Tyler in a damaged condition, and the extent of the injuries. Appellant objected. Evidence was afterwards adduced tending to show that the horses were damaged before they left Texarkana, and were not injured thereafter. This made the evidence, as to their condition when they reached Tyler, competent. The order in which the evidence was adduced should have been reversed, but no injury was done on account of the time at which it was presented. *Cox v. Vise*, 50 Ark. 283, 7 S. W. 134.

The court, over the objection of the defendant, instructed the jury as follows "If the jury find for the plaintiff, the measure of damage is the difference in the actual cash market-value of the animals injured immediately before and immediately after said injury, with six per cent per annum interest thereon from the date of said injuries." The objection of appellant to this instruction is, it did not inform the jury by what market they should be governed in determining the value of the horses and the damage to them in transportation, whether the market of St. Louis, Little Rock, Texarkana or Tyler. It says the market of Texarkana should have governed, because it was

the place where it was to deliver the horses to the connecting carrier. But this does not seem to us to be a correct measure. The depreciation of the horses by reason of the injuries according to the market of Tyler, the ultimate destination, — the cost of transportation having been paid, — was the actual loss sustained by appellee. This was the natural consequence of the injuries, according to the usual course of things, and is as direct and proximate as it would have been had the appellant undertaken to deliver the horses at Tyler. The appellant undertook to carry them to Texarkana, with the knowledge that they were to be delivered to their owner at Tyler; and the loss sustained according to their market-value at the latter place was in the reasonable contemplation of both parties. For these reasons the damages occasioned by the negligence of the appellant should have been assessed upon the basis of the market-value of the horses at Tyler. *Sisson v. Railroad Co.*, 14 Mich. 489; *Railroad Co. v. Johnston*, 75 Ala. 596; *Cutting v. Railroad Co.*, 13 Allen, 381, 389; *Fox v. Railroad Co.*, 148 Mass. 220, 19 N. E. 222; *Transportation Co. v. McClary*, 66 Ill. 233; 3 *Suth. Dam.* (2d ed.) sec. 932. See *Railroad Co. v. Estill*, 147 U. S. 591, 614-617, 13 *Sup. Ct.* 444. The value of the horses as it would have been had they been transported with proper care, and their depreciation on account of the injuries, was estimated according to the Tyler market by all the witnesses, who testified in respect thereto, except the appellee, and he did not state by what market he was governed. According to his testimony, he was damaged at least \$630, and the jury assessed them at \$400. So, it is apparent the jury were not governed by his estimate. The fair inference is that they assessed the damage upon the basis of the Tyler market. That being true, the appellant was not prejudiced by the omission to inform the jury that they should be governed by the market at Tyler.

Judgment affirmed.

Opinion by BATTLE, J.

KANSAS CITY, FORT SCOTT AND MEMPHIS RAILWAY COMPANY v. BECKER.

Supreme Court, Arkansas, February, 1897.

EMPLOYEE INJURED WHILE BOARDING ENGINE—FELLOW-SERV-
ANT—BURDEN OF PROOF.—Where a fireman was injured while
attempting to board his engine, due to alleged negligence of the engineer, the

burden was upon him to prove that he and the engineer were not fellow-servants.

FELLOW-SERVANT—COURT MUST INTERPRET STATUTES.—It was error for the court to read to the jury the statutes as to the law of fellow-servants without interpreting the same.

APPEAL from judgment rendered for plaintiff in the Circuit Court, Craighead County.

WALLACE PRATT, I. P. DANA, and OLDEN & ORR, for appellant.
E. F. BROWN and N. F. SAMP, for appellee.

This action was brought by William Becker against the Kansas City, Fort Scott & Memphis Railroad Company to recover damages for personal injuries. The plaintiff was a fireman in the service of the defendant, and was engaged in operating one of its trains between Thayer, Mo., and Memphis, Tenn. On the evening of April 21, 1894, his engine, No. 30, with George Bennett as engineer, left Thayer for Memphis, and reached the latter place early in the morning of the next day, and, returning, left Memphis on the following evening, and reached Afton, Ark., at daylight the next morning, where it ran on a side track, and stopped to await the arrival of a passenger train. While there, plaintiff alighted for the purpose of putting out the headlight. Before he returned to his place, the passenger train arrived, and his engine backed out; and as it did so, and while it was moving, he attempted to get upon it. In doing so, he placed one of his feet upon a step attached, for the purpose of enabling the engineer and fireman to get upon it, and arose from the ground, when the step turned, and he fell. His left foot and ankle were thrown across one of the rails of the railway track, and were run over by the engine, and crushed so badly that they had to be amputated. These injuries are the cause of the damages for which he sues. He bases his right to recover upon the failure of the railway company to maintain the step, which caused his fall, in a secure condition. This step was fastened to the lower end of an iron or steel rod, which was one and one-quarter inches in diameter, and about two feet long, and passed through a solid iron beam, and was fastened and held in place by means of a tap at the top. When in proper position, it faced out at right angles to the side of the engine. When loose, it could be turned out of place, but could be fastened and made secure by means of a tap at the top of the rod. Plaintiff insists that it was the duty of the defendant to so fasten the rod that the step attached to it would not turn when the fireman or engineer stepped or leaped upon it and to maintain it in such condition, and for the failure to do so, it is liable to him for damages. To show that the defendant was guilty of culpable negligence in the failure

to discharge this duty, evidence was adduced in the trial of this action tending to prove that the engine was taken on the 18th of April, 1894, to its shops at Thayer, for inspection and repair; and that on the 20th of April at Memphis, the step was discovered to be loose, and on the 21st of April, at Thayer, and was loose on the 23d of the same month, when the plaintiff was injured. On the contrary, evidence was adduced by the defendant to show that the step was not loosened at the shops when the engine was there for repair, on the 18th of April, and the inspector did not notice that it was loose or turned; that it was the duty of the engineer to examine it on every trip to see if it was loose, which could be ascertained by striking it with a hammer or shaking it; and that he was furnished with a wrench to fasten it if it was loose; and that he examined it on the evening of April 22, 1894, at Memphis, by striking it with a hammer, and found it apparently "all right." The defendant testified that firemen received from \$60 to \$110 a month, and that an engineer's salary was from \$100 to \$200 for the same time, and that the defendant promoted firemen to engineers according to seniority.

Under this evidence, a question arose as to the fireman and engineer being fellow-servants. Upon this question the court instructed the jury, over the objections of the defendant, as follows:

"The jury are instructed that, if they find from the evidence that the plaintiff was injured by his own negligence, you will find for the defendant; but if you find that the plaintiff was not injured by his own negligence, but by the negligence of some one else, then it will be necessary for you to find by whose negligence he was injured; and, if he was injured by the negligence of his fellow-servant, he cannot recover.

"And before you can find for the plaintiff, you must find that the negligence of the person that caused his injury was not a fellow-servant with the plaintiff, under the rule just read you from the statute (1)."

1. The court read the rule as to the law of fellow-servants in Sand. & H. Dig. as follows:

"Sec. 6248. All persons engaged in the service of any railway corporation, foreign or domestic, doing business in this State, who are entrusted by such corporation with the authority of superintendence, control or command of other persons in the employ or service of such corporation, or with the

authority to direct any other employee in the performance of any duty of such employee, are vice-principals of such corporation, and are not fellow-servants with such employee.

"Sec. 6249. All persons who are engaged in the common service of such railway corporations, and who, while so engaged, are working together to a common purpose, of same grade, neither of such persons being

And the court refused to instruct the jury, at the request of the defendant, as follows:

" 16. That, without proof of facts that would take Bennett and Becker out of the rule, they were in law fellow-servants; and the burden of proving they were in different departments, or that one had superintendency or control of the other, or were of different grades, is on the plaintiff, Becker; and, unless he has so shown, the defendant would not be liable for the negligence of Bennett in failing to inspect the step at Memphis."

" 17. The court instructs the jury that if you find from the evidence that the engineer, Bennett, who had charge of engine 30 on the trip on which Becker was injured, was provided with the necessary tools to tighten the step in case it got loose, and that it was his duty to so tighten it, and to examine the engine to see if it was safe, and failed to do so, then this neglect was that of a fellow-servant, for whose negligence the defendant would not be liable."

The jury returned a verdict in favor of the plaintiff for \$5,000 and the court rendered judgment accordingly.

The circuit court erred in giving the statutes, without explanation, as an instruction to the jury. They were susceptible of more than one interpretation, as shown by the contention of counsel in this case, and parts of them were not applicable to the facts before the jury. It was the duty of the court, and not of the jury, to interpret the statutes. The instructions of the court should be susceptible of only one construction.

The court erred in refusing instruction numbered 16, which was asked for by the defendant. Upon the plaintiff devolved the burden of proving his cause of action. The fireman and engineer were in the common service of the defendant, working together to a common purpose, in the same department, as shown by the evidence. The presumption is they were fellow-servants; and it devolved on the plaintiff to show that they were not, in order to make the defendant liable to him for the damages he suffered from the negligence of the engineer. This court cannot take judicial notice of the supremacy or subordination of one to the other, if any exist. *McGowan v. Railroad Co.*, 61 Mo. 528, 532; *Brown v. Railway Co.*, 67 Mo. 122.

entrusted by such corporations with any superintendence or control over their fellow-employees, are fellow-servants with each other, provided nothing herein contained shall be so construed as to make employees of such corporation in the service of such cor-

poration fellow-servants with other employees of such corporation engaged in any other department of service of such corporation. Employees who do not come within the provisions of this section shall not be considered fellow-servants."

The instruction numbered 17, which was asked for by the defendant, does not accurately state the conditions upon which the defendant was or was not liable to a fireman for damages occasioned by the negligence of the engineer. If they were fellow-servants, it was not. The question is, were they fellow-servants? The decision of this question involves to some extent the construction of the second section of an act entitled "An act to define who are fellow-servants, and who are not fellow-servants," approved February 28, 1893, which provides that "all persons who are engaged in the common service of such railway corporations, and who, while so engaged, are working together to a common purpose, of same grade, neither of such persons being entrusted by such corporations with any superintendence or control over their fellow-employees, are fellow-servants with each other; provided, that nothing herein contained shall be so construed as to make employees of such corporation in the service of such corporation fellow-servants with other employees of such corporation engaged in any other department or service of such corporation. Employees who do not come within the provisions of this section shall not be considered fellow-servants."

As the fireman and engineer in the case before us were unquestionably engaged in the common service of the defendant, in the same department, and working together to a common purpose, they were fellow-servants, if they were of the same grade. The question, then, for us to decide, is: What do the words "of same grade" mean as used in the second section of the act of February 28, 1893? We are relieved of every difficulty in the decision of this question by the act itself. Immediately following these words are the following: "Neither of such persons being entrusted by such corporations with any superintendence or control over their fellow employees." It seems to us the latter words can serve no purpose unless it be to explain the words "of same grade," which precede them. If this was not their purpose, they were entirely useless and without a purpose, for the idea conveyed by them is already expressed in the words "of same grade." The words "of same grade," without qualification, may be of broader signification, and difficult to explain. But we think that the words following were intended to, and do, explain what is meant by them. In that way we can only give to all these words some effect, as they were doubtless intended to have.

If, therefore, neither the fireman nor the engineer had superintendence or control of the other, they were fellow-servants, otherwise, they were not; and, if fellow servants, the defendant is liable

to neither for damages caused by the negligence of the other in the performance of his duties. *Railway v. Gaines*, 46 Ark. 555; *Railway v. Rice*, 51 Ark. 467, 11 S. W. Rep. 699.

Judgment reversed.

Opinion by BATTLE, J.

WEST ET AL. V. SUDA.

Supreme Court of Errors, Connecticut, March, 1897.

REFORMATION OF CONTRACT—SIGNING WITHOUT READING.—

Where a contract was about to be signed by the parties who had previously read it, and certain agreed changes were read to a third person, who undertook to make the erasures but failed to do so correctly, it was not negligence for the parties to sign the contract without again reading it, and the reformation of the contract as agreed by the court was proper.

APPEAL from judgment, City Court of Hartford, ordering reformation of contract as asked by plaintiffs.

The plaintiffs are builders and contracted with the defendant to do the carpenter and mason work on a house to be erected for the defendant on his land. The complaint asks for a reformation of the contract and damages. It appears from the complaint that the first offer of the plaintiffs to build for a specified sum, was not accepted, and the defendant then asked the plaintiffs to make another estimate, excluding therefrom certain items in a memorandum prepared by the defendant, and that the plaintiffs made such estimate, which was accepted by the defendant and a contract between them executed in pursuance thereof. That when the parties met to execute the contract, Mr. West, one of the plaintiffs, read from the defendant's memorandum the list of items agreed by both parties to be excluded, and Frank Suda, a son of the defendant, undertook to erase from the plans and specifications such items as they were read, and all the parties believed that the same were all so erased, but by inadvertence, Frank Suda failed to erase some of the items that were read. That both plaintiffs and the defendant then signed the contract, plans and specifications, believing that Frank Suda had stricken out all said items contained in said memorandum and read to him, and acting under the mutual mistake. That the plans and specifications had been read by the plaintiffs and examined by them, but they did not re-read them after Frank Suda had made the erasures as above mentioned, and before execution. That the memorandum headed "Things to be left out," was taken away by defendant,

who, without any ground under the reformed contract, but claiming that the plaintiffs had not complied with the plans and specifications, ejected the plaintiffs and their workmen, took possession of the building and of materials furnished by plaintiffs.

JOSEPH L. BARBOUR, for appellant.

EDWARD D. ROBBINS and GEORGE A. KELLOGG, for appellees.

In respect to the items agreed to be omitted, the documents signed did not express the actual contract between the parties. This was due to a mere clerical mistake of the scrivener. That such a mistake may be corrected by a court of equity cannot be questioned. *Wooden v. Haviland*, 18 Conn. 101, 106. The failure of the plaintiff West to again read the papers before execution, in order to verify the erasures made under his eyes, and at his dictation, is not conclusive evidence that the mistake was due to his negligence. The rule of law that no one shall be allowed to escape his contract obligations by saying he did not read what he signed, is a most wholesome and necessary rule, but, as applied to the fact of mistake, it is a rule of evidence. The failure to read is not always conclusive of negligence. For obvious reasons it is not conclusive in this case. The rule did not bar the trial court from finding that the mistake was not due to the negligence of the plaintiffs. *Palmer v. Insurance Co.*, 54 Conn. 488, 510, 9 Atl. 248.

No error in judgment of City Court.

Opinion by HAMERSLEY, J.

BALTIMORE AND OHIO RAILROAD COMPANY V. NORRIS.

Appellate Court, Indiana, March, 1897.

INJURY TO TRESPASSER.—A railroad company is liable for wilful and unnecessary injury to a trespasser by a conductor, acting within the scope of his authority.

CARRIER AND PASSENGER.—A person who, finding the ticket office closed, gets on a train without a ticket and without knowing that the train makes no stop at the station where he wishes to go, is, nevertheless, entitled to remain on the train, as a passenger, by paying his fare to the first regular stopping station.

PASSENGER OFFERING TO PAY FARE FOR ANOTHER—EJECTION.—Where a person, in company of plaintiff and others, offered to pay fare for all of them and, at the same time, showed money more than sufficient for the purpose, before the conductor ordered the plaintiff off or attempted to

have the train stopped, and the conductor refused to carry them, the offer was sufficient to make the expulsion wrongful.

EXPULSION FOR DISORDERLY CONDUCT.—Where there was an abusive altercation between the conductor and a passenger, begun by the conductor, the language of the passenger could not be regarded as so disorderly as to authorize his expulsion from the train, after an offer was made to pay his fare.

APPEAL from judgment, Circuit Court, DeKalb County, in favor of plaintiff.

J. H. COLLINS and JAMES E. ROSE, for appellant.

FRANK S. ROBBY, JOHN S. SHERMAN, SOL. A. WOOD and DAN. M. LINK, for appellee.

The appellee sued the appellant and recovered judgment for \$150 for the acts of a conductor in ejecting the appellee from a train. The complaint contained two paragraphs; the second showed in substance that the appellee, having been prevented by the fact that the ticket office was closed from purchasing a ticket or ascertaining at what places the train stopped to receive and deliver passengers after leaving Garrett, and having seated himself in the car, and taken passage thereon, he tendered to the conductor, when he came through the car, payment of the regular cash fare charged by the appellant for transportation between the said towns; that he was then informed, and for the first time learned, that the train did not stop to take on and deliver passengers at Albion; that he thereupon offered to pay and tendered to the conductor payment of the regular cash fare charged by the appellant from Garrett to the first regular stopping place of the train, before he was ordered to leave the train, and before any active steps had been taken to eject him therefrom; that the conductor wrongfully refused to receive said fare; that by the rules and regulations of the appellant the train was scheduled to stop at the town of Walkerton to discharge passengers, and that the appellee offered to pay his fare to that town, but the appellant wrongfully refused to receive said fare, or to transport him to that town, but wrongfully and unlawfully ejected him from the train, etc. The first paragraph contained an allegation that, after the appellee offered and tendered to the conductor the regular cash fare charged by the appellant for transportation between Garrett and Albion, the appellant, by its said conductor, with force and violence, assaulted the appellee. If the first paragraph did not show the appellee to be entitled to be considered a passenger, but showed him to be a trespasser, still the appellant was bound not to injure him wilfully. It was alleged that the appellee used no force in resisting ejectment, but in all things conducted himself in an orderly,

proper, and law-abiding manner, and that the conductor, in ejecting him, used unnecessary force, and accompanied his acts with opprobrious and indecent language and epithets, which he applied to the appellee in the presence and hearing of a number of persons in the car; that the appellee was greatly humiliated and mortified thereby and put in great anxiety of mind; and that he was disgraced in the eyes of the persons who heard said language, and were not familiar with the facts. All such injury is wilful, and being inflicted by the conductor while acting within the scope of his authority, the appellant would be liable therefor, whether the injured person were a passenger or a trespasser (1). But we are of the opinion that the second paragraph of the complaint proceeded upon the theory of a wrongful expulsion of a passenger, and that it may be held sufficient as such a complaint (2). Though the appellee had no right to require the conductor to deviate from the rule and to demand to be put down at Albion, where the train was not scheduled to stop, he could lawfully remain upon the train as a passenger by paying his fare to the first regular stopping station, which he offered to do. *Railroad Co. v. Lightcap*, 7 Ind. App. 249, 34 N. E. 243.

A question is suggested in argument as to the manner in which the offer to pay fare to the first stopping place was made. It appears from the evidence that the appellee was accompanied by four men; that when the appellee had tendered the amount of the fare from Garrett to Albion to the conductor, and had been informed by the latter that the train would not stop at Albion, and before the conductor had ordered him off or had made any attempt to stop the train, one of appellee's companions offered to pay the fare for the whole party to the next stopping place, and took out his pocket-book and money, having more than sufficient to so pay, but the conductor refused to carry them, and compelled them to get off the train. We think the

1. In *Railroad Co. v. Bills*, 118 Ind. 221, 20 N. E. 775, it was said that expulsion from a train, with excessive force and violence, is equivalent to an assault and battery, and that no degree of carelessness on the part of the person assaulted furnishes any excuse for an unlawful invasion of the right of personal security; and in 104 Ind. 13, 3 N. E. 611, it was said that a railroad company is liable to one who has been ejected from a train, by the conductor, with unnecessary force, though the latter had the right to expel such person.

2. Where a person gets on a train by mistake, the relation of passenger and carrier exists, and such person is entitled to be treated as a passenger, while on the train. *Col. C. & I. C. R. Co. v. Powell*, 40 Ind. 37, 41, 3 Am. Neg. Cas. 100; *Cin. H. & I. R. R. Co. v. Carper*, 112 Ind. 26, 3 Am. Neg. Cas. 186, 13 N. E. 122; *Railroad Co. v. Mays*, 4 Ind. App. 413, 30 N. E. 1106; *Ham v. Canal Co.*, 142 Pa. St. 617, 21 Atl. 1012; *Railroad Co. v. Garrett*, 8 Lea, 438.

offer to pay fare shown as above stated was sufficient to make the expulsion unlawful (3).

It was in evidence that when the conductor came to the appellee, the latter placed in the hand of the conductor a certain sum, being the fare from Garrett to Albion; that the conductor said: "Where the hell are you going?" and the appellee said he was going to Albion; that the conductor said that the train did not stop there; that the appellee said he guessed it did; that the conductor said: "You knew this train didn't stop at Albion," interjecting an abusive and indecent epithet. "What in hell are you on this train for?" Afterwards the conductor, having said something about losing his job, the appellee told the conductor that he had paid him cash fare at a previous date, that he (the conductor) had accepted it and did not give the appellee a cash receipt, and the appellee threatened to report the conductor for what he had done on that previous occasion. It is claimed, in effect, that this language of the appellee was a sufficient provocation for the conduct of the conductor. It must be observed that if the evidence for the appellee be accepted as true, the conductor himself commenced the abusive altercation, and was guilty of the first offensive provocation. Under such circumstances, we cannot regard the language of the appellee as so disorderly as to authorize his expulsion after the offer to pay his fare. See *Railroad Co. v. Wolfe*, 128 Ind. 347, 27 N. E. 606; *Railroad Co. v. Flexman*, 103 Ill. 546.

Judgment affirmed.

Opinion by BLACK, J.

NEW YORK, CHICAGO AND ST. LOUIS RAILWAY COMPANY v. ZUMBAUGH.

Appellate Court, Indiana, March, 1897.

RAILROADS—LIABILITY FOR KILLING HORSES ON RIGHT OF WAY.—Where horses were killed upon defendant's right of way, a finding that the cattle guard at the highway crossing where the horses entered was

3. In *Ham v. Canal Co.*, 142 Pa. St. 617, it was held, that if the actual tender of fare be made before the train has been stopped, the conductor cannot refuse it, no matter who made the tender.

In *O'Brien v. Railroad Co.*, 80 N. Y. 236, it was held, that where the train

had not been stopped for the sole purpose of putting the passenger off, if, before being ejected, he or others in his behalf, offer to pay the full fare, the conductor should accept it; and that if he refuses to do so and ejects the passenger, the company will be liable.

inherently insufficient to turn stock was conclusive as to defendant's liability under sec. 5323, Rev. St. 1894.

APPEAL from judgment, Circuit Court, Marshall County, in favor of plaintiff.

MORRIS, BELL, BARRETT & MORRIS and CHAS. P. DRUMMOND, for appellant.

CHARLES KELLISON, for appellee.

This was an action to recover damages for stock killed on appellant's line of railroad. The negligence charged was, in the language of the complaint, "by neglecting to construct and maintain proper and suitable cattle guards and cattle pits where a certain highway, etc., crosses said road, sufficient to prevent horses and other stock from getting upon the line of defendant's track." Two of appellee's horses escaped from a field to a highway and thence wandered upon appellant's track. The case was tried without a jury and the court found that at the highway crossing the right of way was not securely fenced; "that said cattle guard was in as good order at the date of the killing as when first put in, the deficiency, unfitness and insufficiency in said cattle guard being inherent in its construction; and that said cattle guard, when placed on the railroad track as said guard was placed, was insufficient, unsuitable, and unfit to turn stock generally, and especially stock of the horse kind, at the time of said killing." This finding is conclusive and binding, and in our judgment clearly shows that the cattle guard in question was defective and insufficient, and fully sustains the allegation of the complaint as to the negligence of the appellant in not securely fencing its right of way. It cannot be said that such railroad was securely fenced within the meaning and spirit of sec. 5323, Rev. St. 1894 (sec. 4098a, Horner's Rev. St. 1896); and where stock wander on a railroad right of way by reason of insufficient and defective cattle guards, and are killed or injured, the railroad company will be held liable. *McKinney v. Railroad Co.*, 22 Ind. 99; *Pennsylvania Co. v. Mitchell*, 124 Ind. 473, 24 N. E. 1065.

Judgment affirmed.

Opinion by WILEY, J.

NEW YORK, CHICAGO AND ST. LOUIS RAILWAY COMPANY v. GROSSMAN.

Appellate Court, Indiana, March, 1897.

SPECIAL FINDING — RAILROADS. — An interrogatory whether the fire from defendant's locomotive, through the medium of combustible materials, without any fault or negligence of plaintiff, escaped from defendant's right of way to plaintiff's land and damaged his property, was improper as it embraces more than a single fact and calls for a conclusion.

LIABILITY FOR FIRE. — Facts which show that appellant was negligent in allowing fire to escape and destroy appellee's property.

NEGLIGENCE. — An owner of land is not bound to use unusual precautionary measures to protect his property from injury from a fire set by a locomotive on an adjoining right of way.

APPEAL from judgment, Circuit Court, Marshall County, in favor of plaintiff.

MORRIS, BELL, BARRETT & MORRIS and PACKARD & DRUMMOND, for appellant.

W. B. HESS, for appellee.

Appellee recovered a judgment for damages resulting from fire alleged to have been negligently started by appellant, and negligently permitted by appellant to go upon and destroy appellee's property.

It is argued that interrogatory 6 and the answer are vague, and that the answer is a conclusion, and not a fact. "Int. 6. Did said fire, through the medium of such combustible materials, without any fault or negligence of the plaintiff, escape and run off from said defendant's right of way to the plaintiff's said land, and burn and damage and destroy his property as described in the complaint? Answer. Yes." We do not think the interrogatory is a proper one under the act of 1895. It is not possible to tell whether the jury intended to say that the fire escaped from the railroad right of way onto plaintiff's land, and destroyed his property, or whether it was the jury's conclusion that the fire escaped without plaintiff's fault, or whether it was their conclusion that it destroyed plaintiff's property, without his fault. If the jury found in other parts of the verdict that the fire originated on the railroad right of way, and that it escaped to appellee's land, and destroyed his property, all of which they did find in answer to other interrogatories, then the only part of the question left would be the fault or negligence of appellee, to which the answer is simply a conclusion. *Board, etc. v. Bonebrake*

(Ind. Sup.) 45 N. E. 470. The interrogatory embraces not only more than a single fact, but also calls for a conclusion, and should not have been submitted to the jury, although it is not available error. When it is shown that combustible material, liable to be set on fire by sparks from passing locomotives, was allowed to accumulate and remain upon appellant's right of way; that it was an exceedingly dry time; that there was a "brisk wind" blowing towards appellee's land, which adjoined appellant's right of way; that sparks from a passing engine set fire to such material on appellant's right of way, from which place appellant negligently permitted it to escape to appellee's land and destroy his property — such facts show that appellant was negligent, and that such negligence was the proximate cause of the injury to the appellee.

The fact that the special verdict fails to show that appellee did anything to prevent the escape of the fire to his premises cannot be construed to be a failure to find his freedom from fault (1). It appears from the special verdict that the appellee did expend labor in suppressing the fire. It thus appears he did make an effort to save his property from destruction. The appellee was not bound to use unusual precautionary measures to protect his property from injury at the hands of appellant. *Railway Co. v. Smith*, 6 Ind. App. 262, 33 N. E. 241; *Railway Co. v. Kern*, 9 Ind. App. 505, 36 N. E. 381. The special verdict, taken as a whole, we think, is sufficient to sustain the judgment in appellee's favor.

Judgment affirmed.

Opinion by ROBINSON, J.

LOUISVILLE, NEW ALBANY AND CHICAGO RAILWAY COMPANY v. LYNCH.

Supreme Court, Indiana, March, 1897.

EXPLOSION OF BOILER OF LOCOMOTIVE.—An instruction that the jury might consider the fact of the explosion of the boiler, whereby the plaintiff

1. In *Railroad Co. v. Johnson*, 4 C. C. A., 447, 54 Fed. 474, it is said: "It is very well settled that it is not contributory negligence for the occupant of land adjoining a railroad to leave it in its natural state; and a farmer using his premises in the ordinary and customary manner is not guilty of contribu-

tory negligence for failing to resort to special or extraordinary precautions to prevent the destruction of his property from fire escaping through the negligence of a railroad company." See *Railway Co. v. Hendrickson*, 80 Pa. St. 182; *Railway Co. v. Jones*, 86 Ind. 496.

was injured, in connection with other facts proven, in determining whether the locomotive was defective, was proper.

PETITION for rehearing of case reported in 44 N. E. 997, wherein it appeared that plaintiff, while working at a barn about 100 feet from the track of the railroad at a station, was injured by being struck by a piece of the iron of a locomotive boiler that bursted. The jury specially found that the boiler was defective, having forty-five bolts that were worn.

E. C. FIELD, W. L. KINNAN and WALTER OLDS, for appellant.

NELSON & MYERS, STIES & HATHAWAY and G. W. BEEMAN, for appellee.

HACKNEY, J. — In the appellant's petition for a rehearing, counsel insist that the instruction given by the trial court, as copied in the original opinion, erroneously advised the jury that it was proper to consider the fact of the explosion, with the other facts proven, in determining whether the locomotive was defective. To this objection, counsel cite authorities holding (correctly, we think) that the mere fact of an explosion should not be considered in determining the existence of negligence. *Young v. Bransford*, 12 Lea, 232; *Losee v. Buchanan*, 51 N. Y. 476; *Marshall v. Welwood*, 38 N. J. Law, 339, 7 Am. & Eng. Enc. Law, p. 522; 2 *Thomp. Neg.* 1227. To these may be added *Black, Proof & Pl.* p. 23; *Elliott, R. R.* 1299; *John Morris Co. v. Southworth*, 154 Ill. 118, 39 N. E. 1099; *Racine v. Railroad Co.*, 70 Hun, 453, 24 N. Y. Supp. 388. It is apparent that this holding rests upon the rule that the plaintiff assumes the burden of proving the defendant's negligence, and that, since undiscoverable defects might cause explosion without negligence, it would reverse the burden of proof to hold the fact of explosion evidence of negligence, and would require of the defendant proof of freedom from negligence. But does this doctrine apply to the question in hand? The fact of an explosion admits of but two inferences,—negligence in overstraining a boiler free from defects, or the existence of defects which would deny the proper use of the boiler if it were free from defects. The first inference, as held in the original opinion, and not now controverted, was not drawn by the jury, and is not within the present objection to the charge. The second inference we believe to have been proper, since it did not, and should not be permitted to, support the further inference of negligence. We are not advised of any reason for excluding this inference, and it is certain that its acceptance does not violate the rule of proof as to negligence. In a case where general instructions were given, it would be proper for the court, in charging with reference to the fact of explosion, to carefully exclude

a consideration of such fact in determining the existence of negligence primarily, or as an inference upon the inference of an existing defect. In this case, however, there is no such question. The petition is overruled.

CHICAGO AND ERIE RAILROAD COMPANY v. LEE.

Appellate Court, Indiana, March, 1897.

MASTER AND SERVANT — DEATH OF EMPLOYEE — PLEADING.—In an action for the death of the plaintiff's intestate alleged to have been caused by his foot being caught by signal wires crossing the track, as he was coupling a car to the train that knocked him down and ran over him, an allegation that "the wires were so small and so near the ground that they were not perceived by the decedent before he was caught thereby, and that he was ignorant of the danger and it was not to him apparent" does not show that the decedent had no knowledge of the defect at the time of the accident.

PLEADING — ABSENCE OF KNOWLEDGE OF DEFECT.—In such an action the complaint must show that the defendant was guilty of negligence in not providing its employees with a reasonably safe place to work; and that the decedent was not only free from any fault which proximately contributed to his death, but also that he had no knowledge of the dangerous condition of the roadbed at the time he was killed.

EVIDENCE — ILLUSTRATING TO JURY.—To permit a witness who did not see the accident, but was at the place where it happened soon afterwards, to illustrate to the jury how he had shown to others at the time the manner in which he thought the accident might have occurred, was error.

EVIDENCE OF REPAIRING DEFECT AFTER THE ACCIDENT.—It was error to admit evidence that after the accident the defendant covered the wires that were alleged to have caused the accident.

APPEAL from judgment rendered for plaintiff in the Circuit Court, Huntington County.

W. O. JOHNSON and KENNER & LESH, for appellant.

HART & HART and BRANYAN & BRANYAN, for appellee.

Appellee, as administrator of the estate of Glannor Sloan, brought this action to recover damages for the death of said Sloan, caused by the negligence of appellant. The complaint alleged in substance that on the day of the accident the decedent was in the employ of appellant as a brakeman; that on said day, while in his line of duty, while attempting to make a change of link in one of the cars preparatory to making a coupling of the cars, his foot was caught between one of the ties on said road and two wires running parallel

with and close thereto, which wires are sometimes called "signal wires" and were there placed by appellant, running from the interlocking switch to the tower house or to the home semaphore; that the wires were used by appellant as an appliance in making switches or switching its trains; that decedent's foot, being so caught in said wires and held fast so that it was impossible for him to extricate the same, and that the train being moved backward, threw him upon the track, and the cars passed over his body, killing him instantly; that the appellant was guilty of negligence in this: that it allowed said wires for two weeks after the same had been there placed running under the rails of its road, and parallel with the ties, to remain unboxed or uncovered, and liable at any time to trip or catch its employees, and hold them fast until the train there moving would crush them. Plaintiff further avers that the defendant well knew, and its superior officers, that the same was a dangerous appliance, and that the wires being so small and so near the ground that they were not perceived by decedent before he was caught thereby, and that he was ignorant of the danger, and it was not to him apparent, and that he was in all that he did in the premises wholly free from fault, and that his death resulted from the negligence and carelessness of the defendant in not providing for the boxing and covering of said wires. It is contended that these allegations do not show that the decedent was without fault and that the appellant was guilty of negligence, but that the complaint discloses contributory negligence on decedent's part. This complaint seeks to recover for the death of an employee, caused by the negligence of the appellant in maintaining its track and roadbed in an unsafe condition, and it must aver that the decedent was ignorant of the unsafe condition of the roadbed. In such a case the usual allegation that the decedent was free from fault is in itself insufficient. If the decedent had notice of the defective or dangerous condition of the track at that place and voluntarily continued in the service, he assumed the increased risk, and waived any claim upon the employers for damages. *Railway Co. v. Sandford*, 117 Ind. 265, 19 N. E. 770. The complaint in an action of this kind must show that the appellant had made such a change in its roadbed as that it was guilty of actionable negligence in not providing its employees with a reasonably safe place to work; and that the decedent was not only free from any fault which proximately contributed to his death, but also that he had no knowledge of the defective and dangerous condition of the roadbed at the time he was killed. The demurrer to the complaint should have been sustained.

An employee of appellant was called as a witness by appellee. It

seems that this witness had demonstrated at the scene of the accident, immediately after it occurred, how the decedent must have fallen, judging from footprints and other marks on the ground; that he got down on the ground and placing his foot in the trench, where there was a footprint recently made, he illustrated by movements of his limbs and body, how it appeared the accident must have happened, and over an objection and exception by appellant, the witness gave the same illustration and demonstration in the presence of the jury. It is argued that the reproduction in the presence of the jury of this experiment, made at the place of the accident, was simply the opinion of the witness as to how the accident occurred and that its admission was error. We agree that the admission of this illustration and experiment was error. In view of the evidence of the witness himself that he did not see the decedent step into the trench containing the wires, and did not see him fall, we are unable to see how the evidence complained of could be competent. Certain witnesses were permitted, over objection and exception by appellant, to testify that, after the accident, the trench containing the wires was covered. This evidence was not admissible. Whether there had been a negligent discharge of duty on appellant's part must be determined from what appellant did or neglected to do prior to the accident, and not what was done afterwards. *Railroad Co. v. Clem*, 123 Ind. 15, 23 N. E. 965 (1). The court erred in overruling appellant's motion to strike out the evidence of repairs made subsequent to the time of the accident.

Judgment reversed.

Opinion by ROBINSON, J.

1. In *Railroad Co. v. Clem*, 123 Ind. 15, it is said: "True policy and sound reason require that men should be encouraged to improve or repair, and not be deterred from it by the fear that, if they do so, their acts will be construed into an admission that they had been wrongdoers. A rule which so operates as to deter men from profiting by experience, and availing themselves of

new information, has nothing to recommend it, for it is neither expedient nor just." *Board v. Pearson*, 129 Ind. 456, 28 N. E. 1120; *Nalley v. Carpet Co.*, 51 Conn. 524; *Dale v. Railroad Co.*, 73 N. Y. 468; *Hudson v. Railroad Co.*, 59 Iowa, 581, 13 N. W. 735; *Morse v. Railroad Co.*, 30 Minn. 465, 16 N. W. 358.

CLEVELAND, CINCINNATI, CHICAGO AND ST.
LOUIS RAILWAY COMPANY v. WARD.

Supreme Court, Indiana, March, 1897.

MASTER AND SERVANT—INSPECTION OF MACHINERY.—In an action by an employee for personal injuries caused by defective machinery, proof that the defendant employed a competent inspector who inspected the machinery was insufficient to relieve defendant from liability where there was no evidence that the inspection was a reasonably careful one.

PETITION for rehearing of case reported in 45 N. E. Rep. 325.

ELLIOTT & ELLIOTT, for appellant.

J. W. NEWTON and ENGLE & PARRY, for appellee.

HOWARD, J.—In their petition for rehearing, counsel for appellant, in effect, ask us to weigh the evidence heard by the jury, and upon which they based their verdict. This is not our province. It is shown in the principal opinion that there was competent evidence sufficient to sustain the verdict of the jury. That is enough. The fact that some contradictory evidence was heard will not justify a reversal of the judgment. Counsel also insist that, because there was an inspection of the fire-box three days before the collapse, and because there was evidence tending to show that the inspector was competent for the work, it therefore follows that the appellant was not liable. This is not the law, even as admitted by counsel in their original brief. It is not only necessary that the company should have provided a competent inspector, but it is even more necessary that the inspection made should be a reasonably careful one. The inspector might be competent, in a sense,—that is, he might have the necessary skill and experience to make a careful test of the boiler and fire-box; but if, through carelessness or inattention, he actually failed to make a reasonably careful inspection, the company would thereby have failed in the discharge of the duty resting upon it, no matter whether the inspector was competent or not. So, in the recent case of *Egan v. Railroad Co.* (N. Y.) 42 N. Y. Supp. 188, the following was approved: "The inspection of the boiler was the duty of the defendant. Had such duty been carelessly or negligently performed, even by a competent inspector, the master would still be liable." And in *Durkin v. Sharp*, 88 N. Y. 225, the court said: "The inspection of the track was a duty of the master. Had such duty been carelessly and negligently performed, even by a competent inspector, the master would still be liable." The like

rule was maintained in *Car Co. v. Parker*, 100 Ind. 181, where the subject of inspection by the employer is very fully treated, and the authorities are cited and discussed, and the court concludes that "the rule is supported by sound principle." The petition is overruled.

**CITIZENS' STREET RAILROAD COMPANY ET AL.
v. SUTTON.**

Supreme Court, Indiana, March, 1897.

PLEADING.—Where the complaint alleges that the injury was sustained without any negligence on plaintiff's part, it will be adjudged sufficient, unless it clearly appears from the facts specifically alleged that the plaintiff was guilty of negligence which contributed to his injury.

INJURED WHILE DRIVING ACROSS CAR TRACKS.—In an action for injuries sustained by plaintiff in falling from a wagon, from which he was jarred by front wheels dropping into ruts between the rails of a street railroad, which he was driving across, the fact that he knew of the presence of the ruts was not conclusive of his contributory negligence.

APPEAL from judgment, Superior Court, Marion County, in favor of plaintiff.

MASON & LATTA and J. E. SCOTT, for appellants.

DAN. WAIT HOWE and MILLER & BARNETT, for appellee.

Appellee instituted this action against the appellants, the Citizens' Street Railroad Company and the city of Indianapolis, and recovered a judgment in the lower court for injuries sustained by him on one of the public streets of the city by reason of the alleged negligence of the appellants.

The complaint set out the ordinances of the city of Indianapolis as to the laying and maintaining street railroad tracks and requiring that the space between the tracks and two feet outside each rail shall conform to the grade of the street, and further providing that the company operating the railroad shall be liable for damages resulting from its negligence; that the said railroad company by running its cars drawn by mules along Meridian street, two deep ruts in depth from eight to ten inches had been worn in the space between the rails of the track, and were separated by a high ridge of dirt in the middle of said space, and that neither the latter space nor the space to the extent of two feet outside of the rails and adjoining the same conformed to the grade of the street; that the said dangerous condition existed for six months prior to the accident, and could easily have been discovered by the officers of said

city and by said railroad company, and was in fact well known to both defendants; that the plaintiff was, on September 8, 1892, returning home along said street driving a two-horse wagon, and because of building materials on the side of the street on which he was driving it became necessary for him to cross the tracks; that he then and there attempted to drive across said track looking and driving as carefully as he could, but in making said attempt and without any fault or negligence whatever on his part, and solely by reason of the negligence of the defendants as aforesaid, the front wheels of his wagon dropped suddenly into said ruts and so caused him to lose his balance whereby he fell from his wagon upon the ground and was severely injured; that all of said injuries were caused by the negligence of the defendants as aforesaid, and without any fault or negligence on the part of the plaintiff. The appellants contend that the specific averments of the pleading affirmatively disclose that the appellee knew of the dangerous condition of the street at the time the accident occurred, and that this must be deemed to raise a conclusive presumption of contributory negligence on his part. But in this contention, counsel clearly are mistaken. Where the complaint alleges that the injury of which the plaintiff complains was sustained without any fault or negligence on his part, the complaint will be adjudged sufficient in this respect, unless it clearly appears from the facts specifically alleged that the plaintiff was guilty of negligence which contributed to his injury. *City of Elkhart v. Witman*, 122 Ind. 538, 23 N. E. 796; *Board v. Creviston*, 133 Ind. 39, 32 N. E. 735. It is true that the complaint charges that the unsafe and dangerous condition of the track on the street in question "could easily have been discovered by the officers of said city having the supervision of its streets, and by said Citizens' Street Railroad Company." But in the face of the direct averment that appellee was without fault on his part, it cannot be reasonably inferred that he had knowledge of the dangerous condition of the street, and thereby contributory negligence must be imputed to him. At the most, it could only be inferred from these facts that he knew, or might have known, of the defective condition of the street, but not of its unsafe or dangerous condition. Conceding, however, that it might be said that he had knowledge of the ruts in controversy, such knowledge alone would not be conclusive of his contributory negligence. Neither can it be asserted as a legal rule in all cases that knowledge alone that there is some danger will preclude a recovery. *Elkhart v. Witman*, *supra*

Judgment affirmed.

Opinion by JORDAN, C. J.

ROSE v. HALL.

Court of Appeals, Kentucky, February, 1897.

PRACTICE — CONTINUANCE. — Where, owing to absence of plaintiff's witnesses, a motion for continuance was made, but plaintiff failed to show that due diligence was used to obtain such evidence, the application was properly overruled, and verdict properly directed for defendant.

APPEAL by plaintiff from judgment rendered in the Circuit Court, Powell County.

WHITE & SMITH and RIDDELL & RIDDELL, for appellant.

A. T. WOOD & SON, for appellee.

The appellant, Lucretia Rose, sued the appellee, James Hall, in the Powell Circuit Court, to recover of appellee damages for the death of her husband. Appellant alleges that in July, 1889, John A. Rose, her husband, was feloniously, wilfully, and wantonly waylaid and killed and murdered by Jesse Burnett and James Combs, by shooting the said John A. Rose, and not in their self-defense; that the defendant, James Hall, feloniously, maliciously, and unlawfully aided, promoted, advised, procured, and hired Burnett and Combs to so waylay and kill her husband; and that said killing was done in Powell county. She asks judgment for \$30,000. This petition was filed June 6, 1894, and process issued and was executed on the same day. Appellee, Hall, filed his answer, denying each allegation in plaintiff's petition. This answer was filed in open court June 18, 1894. No orders appear in this record until the case was called for trial at the March term, 1895. The appellant moved the court to grant her a continuance of the case on account of the absence of important witnesses who resided in Powell and Letcher counties, and, in support of her application for a continuance, she filed her affidavit; and the court, deeming the grounds for a continuance insufficient, overruled the application to continue, and appellant excepted. A jury was then impaneled to try the case, and, after the jury was sworn, by leave of court, appellant amended her petition, by which she alleges that defendant, Hall, aided, abetted, counseled and advised Jesse Burnett and James Combs to kill and murder her husband, and conspired with Jesse Burnett, James Combs, Charles Wall, and Goodloe Combs to kill and murder her said husband, John A. Rose, and aided, procured, and hired said Jesse Burnett, James Combs, Charles Wall, and Goodloe Combs to kill and murder

the said John A. Rose. The court permitted this amended petition to be traversed on the record. When appellant announced that she was through with her testimony, the defendant moved the court to instruct the jury to find and return a verdict for defendant, to which plaintiff objected; but the court overruled her objection, and gave the instruction as asked for by defendant, whereupon the jury returned a verdict for the defendant, and the court rendered judgment accordingly; and appellant's motion for a new trial having been overruled by the court, she has appealed to this court, and asks a reversal.

One of the grounds for a new trial relied on by appellant is that the court erred in refusing to continue the case on her motion. Appellant's affidavit discloses the fact that the witnesses on account of whose absence she desired to continue resided in Powell and Letcher counties. What distance they resided from the court-house is not stated. No effort was made, by subpoena or otherwise, to have these witnesses present to testify in her behalf. The issue in this case was made in June, 1894, and no diligence of any kind was used to procure the testimony of the absent witnesses. Section 315, Code Prac., provides: "A motion to postpone a trial on account of the absence of evidence can be made only upon affidavit showing the materiality of the evidence expected to be obtained, and that due diligence has been used to procure it." Appellant having failed to show that she used any sort of diligence to obtain the absent evidence, the court properly overruled her application to continue the case. There was no evidence to sustain plaintiff's case, and direction of verdict for defendant was proper.

Judgment affirmed.

Opinion by WHITE, J.

ROCK SPRING DISTILLING COMPANY v. THRUSTON.

Court of Appeals, Kentucky, February, 1897.

LOSS OF WHISKEY — OFFICER — INSTRUCTION. — Where it was alleged that a quantity of whiskey was lost by reason of negligence of a United States gauger, an instruction that if the jury believed such was the fact they should find for plaintiff should have been given, as such gauger is responsible for damage caused by his gross negligence, if not for ordinary negligence.

EVIDENCE. — Where proof was conclusive as to plaintiff's ownership of whiskey lost it was error to submit that question to the jury.

APPEAL by plaintiff from Circuit Court, Daviess County.

J. A. DEAN and SWEENEY, ELLIS & SWEENEY, for appellant.

REUBEN A. MILLER and ROBERT S. TODD, for appellee.

Appellant instituted this action in the Daviess Circuit Court, seeking to recover judgment against appellee for the sum of \$432.25, being the value of whiskey which the appellant alleged was lost by the negligence, etc., of appellee. It is alleged, in substance, that appellee was the United States gauger in charge of the warehouse and cistern-room for the storage of appellant's whiskey, it being engaged at the time in making whiskey. It was alleged in the petition that the distillery was so arranged and constructed that the whiskey, when finished, was conveyed by pipes to tanks or cisterns situated in the distillery warehouse, and in a room in said warehouse known as the "cistern-room;" that from these tanks or cisterns the whiskey was drawn through stopcocks or faucets into barrels, and gauged and entered into the distillery warehouse. There was no means of access to this cistern-room except through a door, and this door was kept locked, and the key in the custody of the United States gauger on duty at said warehouse. No one had access to this room except said gauger, whose duty it was to draw the whiskey from the cistern into the barrels, gauge and mark it, so it might be entered into the distillery warehouse. These stopcocks or faucets were inclosed in a box, which was kept locked, and the key in the custody of said gauger, who alone had access to the said cocks. It was also alleged that appellee was the gauger in charge of said cistern-room, and had the keys to the cistern-room, and also to the box inclosing the stopcocks of the cistern; and that it was his duty to, and he did, each day, unlock the box, open said stopcocks, and draw the whiskey into barrels, gauge and mark it; and that, when through drawing the whiskey, it was his duty to close the stopcocks, and lock the box inclosing them, and to close and lock the cistern-room door, so that no one could gain access to it in his absence,—all of which the appellee undertook to do. It is further alleged that on the 16th of January, 1893, appellee, being on duty, and acting as aforesaid, did negligently and carelessly fail to close the stopcock of the cistern aforesaid, and did negligently and carelessly leave the same open, whereby a large quantity of plaintiff's whiskey — viz., 1,710 gallons — was allowed to run out and waste, to appellant's damage in the sum of \$432.29. The appellee, in his answer, alleged, in substance, that it was the duty of appellant to draw the whiskey from the cistern into the barrels, and denied that it was his duty to do so; denied that he alone had access to the stopcocks; admitted to having the keys, but denied that he owed any duty to appellant in regard to opening or closing the cocks, etc.

Appellee further pleaded that the agents of plaintiff, on the 13th of January, 1893, carelessly failed, after drawing off the whiskey, to close said stopcocks, and allowed them to remain open; and, in consequence thereof, some whiskey of plaintiff's manufacture did run to waste. He also averred that said box was left unlocked by him, or opened, at the special instance and request of the plaintiff, its agents and employees in charge of said distillery; that plaintiff was using a patent pipe connection to attach to said stopcocks or faucets to draw off the whiskey; and, while they were attached, said box could not be locked. The time and amount of loss were denied, and the carelessness of plaintiff in regard to the filler, etc., specifically pleaded. The reply may be considered a traverse of the answer, and alleged that it was appellee's duty to close the box inclosing the stopcocks, which averment was denied by the rejoinder. After the filing of an amended answer and amended reply and offer to file an amended petition, a jury trial was had, and a verdict and judgment were returned, and entered in favor of appellee; and, plaintiff's motion for a new trial having been overruled, it prosecutes this appeal.

Appellant complains, among other things, of the refusal of the court to give the instructions asked by it, and also complains of those given by the court. Instruction W, asked by plaintiff, reads as follows: "Under the law, the defendant, in discharging his duty as United States gauger, was required to use ordinary care and prudence. This much he owed to plaintiff, and, if the jury believe the whiskey alleged to have been lost was lost through the gross negligence of the defendant, the jury should find for plaintiff, as indicated in instruction No. 1." This instruction should have been given. It may be that the primary purpose in investing the gauger with the power, and requiring him to perform the acts, required by law, was to protect and conserve the interest of the general government. Yet it is also clear to us that the gauger must also be responsible to the company or persons whose cisterns and whiskey are under his control, as in this case, for any damage caused by his gross negligence, if not, indeed, for ordinary negligence.

The third instruction given by the court should not have been given. It is manifestly the duty of the defendant to lock the box unless the same was omitted at the request of the plaintiff or some agent authorized to act for it in such matters; and it is evident that, if the box had been locked, the stopcocks would have been closed, and the loss could not have occurred; and if the faucet or barrel filler was obstructing the locking of the box, such obstruction could have been removed by defendant; and if it was not his duty

to do so, he could have required it to be done by the party whose duty it was to do so.

The proof was conclusive that plaintiff was the owner of the whiskey lost, and the court should not have submitted that as a question to be determined by the jury.

Judgment reversed.

Opinion by GUFFY, J.

THE RECEIVER OF OHIO VALLEY RAILROAD COMPANY v. YOUNG.

Court of Appeals, Kentucky, February, 1897

HORSE FRIGHTENED BY NOISE OF TRAIN—SIGNAL—EVIDENCE.—

Where a woman, while driving along a highway parallel to a railroad track, was injured by reason of the horse becoming frightened by the noise of an approaching train, it was error to permit evidence to show that the whistle was not sounded on train approaching crossing, as the question of duty to give signal was immaterial to the case, and a railroad company is not liable for horse becoming frightened at noise of train.

SOUNDING WHISTLE—INSTRUCTION.—In such case, the single issue presented was whether whistle was wantonly blown before and was cause of horse being frightened, or after he was frightened and for purpose of stopping train, and an instruction should be given on that issue.

APPEAL from judgment for plaintiff in Circuit Court, Crittenden County.

FAIRLEIGH & STRAUS, for appellant.

CRUCE & NUNN and T. J. NUNN, for appellee.

Appellee, a woman about sixty three years old, whose residence is a short distance from the track of the Ohio Valley Railroad, about the middle of an afternoon, started therefrom to a church meeting, in a buggy drawn, as she states, by a gentle horse, and having in it, besides herself, three of her grandchildren, aged, respectively, thirteen, seven, and five years. She had gotten about one hundred and fifty yards from her residence, going southward along a public highway parallel to the railroad, when, hearing a construction train going northward, she got out of the buggy, directed her grandchildren to get out, and was holding the horse by the bridle bit, when the train approached, at which the horse became frightened, broke loose, and ran away with the buggy, she being knocked down and seriously injured. There is no reason for attributing the injury to negligence of appellant's servants in charge of the train, by reason

of their failure to blow the whistle upon approach to the public crossing, which was two hundred yards south of where she got out of the buggy, if they did so fail. For she did actually hear or see the approaching train in time to do the only thing she could, under the circumstances, have done, even if the signal of the approach of the train to the crossing had been, at the proper distance therefrom, given. Nor was the railroad company restricted in the reasonable use of its track on account of proximity and relative position of the public highway along which appellee was traveling. The only manner in which the servants of the appellant could have been, or that an effort is made to show they were, guilty of any negligent or wrongful act causing the injury complained of, was blowing the whistle when the train had passed the crossing and was just opposite to the horse of appellee. In our opinion, the evidence and circumstances of the case make it too plain for reasonable doubt that the whistle of the engine did not cause the animal to be frightened, but that it was scared by the noise and approach of the train passing within a short distance of the buggy, for which appellant is not liable, and that the whistle was blown for the purpose of stopping the train to enable those in charge to go to the relief of appellee, already knocked down by the horse; for blowing the whistle at the particular time and place that appellee contends it was done, was too wanton and cruel an act for a person of ordinary reason and humanity to be guilty of. It was error to overrule appellant's motion to exclude from the consideration of the jury evidence tending to show that the whistle was not sounded on approach of the train to the crossing; for it was, under the circumstances of the case, immaterial whether such signal was or was not given, and no doubt that alleged failure of duty was calculated and did influence the jury to conclude that there was culpable negligence, resulting remotely or approximately in injury to appellee. There was evidence bearing on the single issue whether the whistle was wantonly blown before and was the cause of the animal's being frightened, or after he was frightened and had injured appellee, and done for the purpose of stopping the train. On a retrial of the case instructions should be given presenting that single issue to the jury.

Judgment reversed.

Opinion by LEWIS, CH. J

MORGAN ET UX. V. O'DANIEL.

Court of Appeals, Kentucky, March, 1897.

ASSAULT—DIRECTING VERDICT.—Where there was sufficient evidence to prove the allegations in a petition in an action for assault, it was error to direct verdict for defendant, as the facts were for jury to determine.

APPEAL from judgment for defendant rendered in Circuit Court, Marion County.

WM. E. RUSSELL & SONS, for appellants.

W. J. LISLE, for appellee.

GUFFY, J.—This appeal is prosecuted from a judgment of the Marion Circuit Court, rendered in the action of appellants against the appellee. It is substantially alleged in the petition that appellee assaulted the appellant, Mrs. Harriet Morgan, by drawing a stick, within throwing or reaching distance from her, with intent to throw the same, and to hit her with it to her great damage and injury in the sum of \$5,000. At the conclusion of plaintiff's evidence, the court, on motion of appellee, instructed the jury peremptorily to find for the defendant. Thereupon a verdict and judgment was rendered for the defendant, and plaintiff's motion for a new trial having been overruled, the appellants have appealed.

The only question presented for decision is whether the evidence was sufficient to entitle appellants to have the jury pass upon the facts. It may be that the evidence of the assault was not clear, or certainly convincing, but the rule is that if there be evidence sufficient to authorize a jury to believe the allegations of the petition are true, the plaintiff is entitled to have the jury pass upon the facts proven. We deem it unnecessary to recite the evidence in detail. It was stated by the plaintiff that appellee seemed to be quite angry, and used profane language, and in apparent anger threw a stick, with, as appeared to her, the intent to throw at her, being sufficiently near to have hit her; that she thought he was going to throw, and became much alarmed, and fell unconscious to the ground, and so remained for about an hour; she did not know whether or not he threw the stick; that after her recovery defendant again came along, and used profane and angry language, and caused her to again become alarmed and again unconscious; that she was then pregnant, and suffered much bodily and mental harm on account of said assault. It is true that the cursing and swearing may be taken as referring to the husband, who was absent at the time, appellant Harriet being

alone, except two small children. It seems to us that the evidence entitled appellants to a jury trial, and that the court erred in giving the peremptory instruction. The judgment of the court below is therefore reversed, and the cause remanded, with directions to award appellants a new trial, and for proceedings consistent with this opinion.

BICKEL ET AL. V. KRAUS.

Court of Appeals, Kentucky, February, 1897.

JURY — MISTAKE IN SWEARING IN — WHEN OBJECTION WAIVED — PRACTICE.— In an action to recover damages for falling into an excavation in street, a mistake in the swearing in of a juror who was alleged to be hostile to one of the parties in the suit, will not avail to reverse verdict where the objection was not made at the proper time, namely, when the fact was discovered upon affidavit stating the fact

APPEAL from judgment rendered for plaintiff in Circuit Court, Jefferson County.

JOHN BARRET, for appellants.

O'NEAL & PRYOR, ALFRED SELLIGMAN, PHELPS & THUM, and ISAAC T. WOODSON, for appellee.

DU RELLE, J.— This was an action for damages alleged to have been caused by the gross neglect of Jacob and Henry Bickel, the appellants, in making an excavation for a cellar on Market street, in Louisville, extending into or near the sidewalk of the street, by leaving it exposed, without a proper barrier or lights to prevent persons passing on the street from falling into it. It was alleged that the appellee, in passing down Market street, fell into this excavation, whereby he received injuries which resulted in permanent impairment of his mind. The averments of appellee were denied, and contributory negligence was also pleaded. In the trial of the case the record recited, in the usual form, "Wherefore, to try the issues joined, comes a jury, to wit," following with a list of twelve names, in which was included the name of Joseph Gegg. The record shows that, on the day following, the jury, after retiring to consult, returned into court the following verdict: "We, of the jury, find for the plaintiff in the sum of \$1,000," — signed with nine names, eight of which appear in the list of the jury given in the record as having come to try the case, and one of the names being John Gallagher, whose name does not appear in the record list of the jury. This fact does not appear to have been discovered until

the following November; the verdict having been rendered on April 5, 1894. In November a motion was made to set aside the judgment entered upon that verdict, upon the ground that the judgment was void because the verdict was signed and returned by one John Gallagher, who was never sworn as a juror in the case, and was signed and returned by only eight of the jurors who were sworn to try the case. No affidavit of any person is filed to show that Gallagher was not in fact sworn as a juror. On the contrary, upon motion and grounds for a new trial filed immediately after the verdict was rendered, it appeared by the joint affidavit of Gallagher and three others who signed the verdict that "they were sworn as jurors in the above-styled action, which jury returned a verdict herein on the 5th day of April, 1894, and were present at all the deliberations of said jury." It seems probable that the insertion of the name of Joseph Gegg in the record as a member of the jury which came to try the case was a mistake of the clerk, and that Gallagher was the juror who was in fact sworn. However that may be, the objection, even if sustained by the facts,—and it does not, by this record, appear to be so sustained,—must be deemed to have been waived by failure to object at the proper time.

The only other ground upon which much stress is laid in argument is the ground, set up in a motion for a new trial, of malice or prejudice on the part of the jury amounting to actual bias. By the affidavits filed on the motion, it appears that, a few days before the trial, Walter Stone and Jacob Bickel, one of the appellants, had become very hostile, on account of charges and countercharges of official corruption; that E. M. Stone, who was one of the jurors who signed the verdict, was the father of Walter Stone; and that he had, before the trial, exhibited a hostile feeling towards Jacob Bickel, and had refused to recognize him.

Whatever objection existed to Stone on account of the alleged hostility exhibited by him towards Bickel should have been taken advantage of as soon as Bickel discovered the fact that he was on the jury, by motion to discharge the jury, upon affidavit stating the fact, or the objection must be considered as waived. Thompson & M. Jur. par. 302 *et seq.*

**DAVIS (ROSEBERRY'S ADM'R) V. NEWPORT NEWS
AND MISSISSIPPI VALLEY RAILROAD
COMPANY.**

Court of Appeals, Kentucky, March, 1897.

BOY KILLED ON TRACK — CONTRIBUTORY NEGLIGENCE. — Where a boy, sixteen years of age, went upon the railroad track of defendant, and sat thereon behind a curve in the road, having been warned of his danger in sitting there, and shortly after was struck and killed by train, he was guilty of such contributory negligence as precluded recovery.

APPEAL from judgment rendered for defendant in the Circuit Court, Carter County.

JAMES ANDREW SCOTT, for appellant.

JOHN T. SHELBY, for appellee.

On August 1, 1891, William Roseberry, a boy sixteen years of age, was run over and killed by a freight train of appellee, while running at the rate of eight or ten miles per hour, in Carter county, Ky. The appellant, Jesse Davis, qualified as his administrator, and instituted this suit on April 15, 1892, alleging that the death of his intestate resulted from wilful neglect of the engineer in charge of and operating the engine attached to and drawing the train which killed him. To this petition the defendant entered its appearance, and filed a general demurrer on the ground that the petition did not state facts sufficient to support a cause of action. Afterwards, on March 18, 1893, and before the demurrer was acted upon, the plaintiff tendered an amended petition, which he was permitted to file against the exception of the defendant, charging that defendant negligently and carelessly, while operating its engine and cars, ran over and killed Roseberry; withdrawing the allegation of wilful negligence, and alleging that plaintiff's intestate was not at the time of his death in the employ of the defendant; also alleging that at the time of said death the decedent was sitting upon the tracks of defendant, in fair view of the engineer, after he had rounded a curve in the road, for at least 300 feet, and that said engineer could have seen and stopped the train, after the spot on which decedent was sitting came in his view, in time to have prevented the accident. In June, 1893, the defendant filed its answer to the original petition, admitting the killing, but denying that the same resulted from the carelessness, negligence, or wilful neglect of its agents or employees, and asserting that they did everything possible to avoid

the accident after they saw or could have seen the decedent, and alleging that the accident was due to the negligence of the decedent in coming upon the tracks of the defendant, and carelessly and negligently remaining on the said track, when he well knew of the approach of defendant's train, or could have known of same by the exercise of reasonable care, and that he negligently and carelessly failed to take any steps to avoid being struck by same, or to get out of the way of the engine, when he could have done so by using ordinary prudence. At this term of the court the defendant renewed its motion to the court to set aside the order made in the action overruling the demurrer to the original petition, and asked the court to reconsider its action upon the demurrer, and also to strike from the file the amended petition filed at the March term of court, changing the cause of action from one for wilful neglect to an allegation of carelessness and negligence. The court sustained this motion, set aside its former ruling, and sustained a demurrer of defendant to the original petition, and required the plaintiff to elect whether he would proceed on the cause of action, for wilful neglect, set up in the original petition, or for gross negligence, as set up in the amended petition. Plaintiff excepted to the ruling of the court, and elected to proceed under the amended petition. All the allegations of the answer to the original and amended petition were denied in detail by reply, and a jury, being impaneled on March 14, proceeded to try the case. At the close of plaintiff's testimony the court gave the jury a peremptory instruction to find for the defendant, to which plaintiff objected and excepted, and prays an appeal to this court, and asks a reversal because the court refused to permit the excluded testimony to go to the jury, and, second, because of the peremptory instruction given against his objection.

It is insisted by counsel for appellee that as the death of Roseberry occurred in August, 1891, the cause of action is regulated by chapter 57 of the General Statutes, and, as the original petition charged wilful neglect, that a general demurrer should have been sustained to the petition, as it failed to show the decedent left either widow or child, and stated no cause of action under section 3 of chapter 57; that the amended petition filed March 17, 1893, withdrawing the allegation of wilful neglect, and charging that the death was caused by negligence, entirely changed the cause of action, and set up in substance a new ground for recovery; and he claims that the first paragraph of the amended answer, which consists of the plea of statute of limitations, should have been sustained, especially as plaintiff neither demurred to nor replied to

this plea. The case of *Railroad Co. v. Privitt's Adm'r*, 92 Ky. 223, 17 S. W. Rep. 484, is relied on to sustain this contention that the amended petition set up an entirely separate and distinct cause of action, and that the same was in no sense an amendment to the original petition. We cannot concur in this contention of defendant. The essential averment of the original petition was the death of the intestate, and that this was occasioned by the act of the railroad company in running its cars over him. The amended petition did not set up a new cause of action, as it set out the same facts, and simply alleged a different degree of neglect from that complained of in the original petition; and as the facts stated both in the original and amended petition distinctly set out the time and circumstances of the death, and as the original petition was filed in the time required by law, we think the demurrer was properly overruled, and that the action could have been properly prosecuted as amended. Nor do we think there is anything in the opinion relied on which is inconsistent with this view, but it seems to us all the facts in this case clearly establish that the decedent contributed to his death by his own want of care. He went upon the tracks of defendant, and took his seat thereon, behind a curve in the road, and on a high fill, in broad daylight. Within less than fifteen minutes after he had been warned of his danger in sitting there, he was run over by the engine and cars of defendant. The testimony of plaintiff in this case clearly establishes that there was a sharp curve in the track of the road, which prevented the point in the roadbed where the boy was sitting from being seen by the engineer and those having charge of the train until it had approached so close as to have made it impossible, by the use of all appliances for stopping said train with safety, to have done so in time to have prevented same from striking the decedent; and it does not seem to us, from the proof in this case, that the defendant could, by the exercise of reasonable care and skill, have avoided the accident. It appears to us that the plaintiff's intestate was guilty, in a high degree, of contributory negligence. He had been warned of his danger. The evidence shows that the locomotive whistled at Denton station, not over 300 yards away; that the train was a long and noisy one; and that by reasonable care he could have avoided the accident. We do not think that the rule which has been established as applicable to cities, with regard to accidents in the corporate limits, applies to a hamlet like Denton, having no streets or alleys, although, where persons have been accustomed to use the track of a railroad company for passageway in certain localities, the company is charged with notice of such use, and is under obligations to keep a careful

lookout in such cases, even though the parties so using the track are really without authority, and, in fact, trespassers. But we think that it is clear from the evidence that the deceased could not have been seen by those having charge of the train in time to have avoided the accident, and that no effort was lacking on their part, after he was discovered, to prevent the accident. The testimony which was excluded from the consideration of the jury, as to what was said by the conductor, does not come within the rule which allows testimony as a part of the *res gesta* to be admitted; and the testimony as to the relations between the brakeman and engineer, as offered to be proved, was hearsay testimony, and the ruling of the court in refusing said testimony was right.

Judgment affirmed.

Opinion by BURNAM, J.

LEAVITT v. BANGOR & AROOSTOOK RAILROAD COMPANY.

Supreme Judicial Court, Maine, February, 1897.

MASTER AND SERVANT—INDEPENDENT CONTRACTOR.—Where it appeared that a railroad company contracted to have its wood, along the line of its road, sawed in lengths suitable for fuel at a stipulated price per cord; that the contractor owned and used for the purpose three railroad cars, one of which was used for a cooking car, in which a fire was kept for the purpose, and that the company placed these cars on one of its spur tracks about 100 feet from the plaintiff's mill, which was burned from fire kept by the contractor in his cooking car, the company was not liable.

AFTER verdict for plaintiff the defendant moved for a new trial. P. H. GILLIN and C. J. HUTCHINS, for plaintiff.

F. H. APPLETON and H. R. CHAPLIN, for defendant.

This is an action of case, by the owner of a lumber mill, against a railroad company for burning the same by fire communicated from the premises of the company. The first count charges the defendant with negligently maintaining a cooking car, in which a fire was kept, on its premises, so near to the plaintiff's mill as to endanger its safety, whereby the same was burned; in short, with maintaining a nuisance, from which danger ensued. The second count charges the defendant with negligence in the management of its fire so kept, in the cooking car, by reason whereof the plaintiff's mill was burned.

The jury found specially that plaintiff's mill was destroyed by fire

communicated from the cooking car, and that defendant was guilty of negligence in locating the same; whereupon they were instructed to assess damages for the plaintiff, which they did. The case comes up on motion to set aside the verdict as against law.

The undisputed facts of the case material to the consideration here are that the defendant contracted to have its wood along the line of its railroad, sawed in lengths suitable for fuel at a stipulated price per cord; that the contractor owned and used for the purpose three railroad cars — one for a living car for the men, one for a tool car, and one for a cooking car, in which a fire was kept for the purpose. To enable the contractor to conveniently do his work, the defendant placed these cars on one of its spur tracks, some seventy-five or one hundred feet from plaintiff's mill; and the question is. Did this act make the defendant liable for the burning of the same from fire maintained by the contractor in the cooking car? The facts of this case come within the doctrine of *McCarthy v. Second Parish*, 71 Me. 318 (1). The contractor here was carrying on an independent business and was in no sense the servant of the defendant company. But it is argued that the mischief of which the plaintiff complains was not the negligent act of the contractor or his servants; but the direct result from using — carefully, if you please — an appliance located by defendant; that the *proxima causa* was the location of the car, the use of which naturally would, and did, cause the damage. But the act of locating the car, and of using it with fire, must be distinguished. The former was the act of the defendant; the latter of the contractor. The car itself was harmless, and its location when unused threatened no injury to plaintiff. The use might create mischief. The thing unused was harmless.

The doctrine of *Burbank v. Steam Mill*, 75 Me. 373, applies. There it was contended that the location of a steam engine for propelling a mill in violation of statute regulations made a nuisance of it *per se*, whereby the plaintiff might recover damages for the burning of his buildings from fire used to make steam for the engine; but the court held that he could not, that the engine itself where located, did not become a nuisance *per se*, but that its negligent use

1. In citing *McCarthy v. Second Parish*, 71 Me. 318, the court said: "It is the settled law in this state that an employer is not liable for the negligent acts of a contractor or his servant where the contractor carries on an independent business, and, in doing his work, does not act under the di-

rection and control of his employer, but determines for himself in what manner it shall be carried on; and that such employment does not create the relation of master and servant. *A fortiori*, the employer cannot be responsible for acts of the contractor or his servants that are not negligent."

might create a liability. So in this case. Here, cars themselves were not objectionable. It was the use that might make them so, and the use was the act of the owner, not of the defendant. Fire in the cooking car might be dangerous at some times and unobjectionable at others. If the wind be strong, and blowing towards inflammable property, it might be gross carelessness, with the short funnel as a chimney, to burn shavings, shingles, and other light and highly inflammable fuel that sends out with the draft, sparks, coals and pieces of wood on fire, while it might be prudent to have a fire of hard coal that would not emit matter in the process of combustion. The car was located without intent to injure. The liability for its imprudent use then rested upon its owner, who was tenant. There is no principle of law that can be invoked to charge the defendant.

Motion sustained.

Opinion by HASKELL, J.

YOUNG v. BOSTON & MAINE RAILROAD.

Supreme Judicial Court, Massachusetts, March, 1897.

RAILROADS—DEATH FROM NEGLIGENCE OF FELLOW-SERVANT.—

Where a conductor was killed by a freight train breaking apart, due to the negligent use of an old rusty link, and there was evidence that the defendant furnished a sufficient number of links, the use of the defective one was the negligence of a fellow-servant and the company was not liable.

FROM Superior Court, Suffolk County. The court directed a verdict for defendant and plaintiff brings exceptions.

S. A. FULLER, for plaintiff.

SOLOMON LINCOLN and THOMAS HUNT, for defendant.

KNOWLTON, J.— We may assume in favor of the plaintiff that there was evidence from which the jury might have found that his intestate was in the exercise of due care. If we assume, without deciding, that a liability under chapter 71 of the Laws of New Hampshire of 1887, could be enforced in this commonwealth, under the doctrine stated in *Higgins v. Railroad Co.*, 155 Mass. 176, 29 N. E. 534, we come to the question whether there was evidence of negligence on the part of the defendant. The accident happened in New Hampshire, and, as the statutes of 1887 (chapter 270) and 1893 (chapter 359) have no extra-territorial force, they cannot be invoked by the plaintiff. The plaintiff's intestate was killed in consequence of the breaking apart of a freight train, and there was evidence that, at the

point of separation, "there was an old, rusty link. About three quarters of it on one side had rusted,—and old rust, from six to seven months old,—and the other was a new break." The negligent use of this link is the only fault charged against the defendant. The question is whether this was negligence of officers or agents, for which the corporation is liable to an employee, or negligence of a servant, for which the defendant is not liable to his fellow-servant. One of the witnesses called by the plaintiff testified that the defendant furnished a sufficient number of links for use in making up this train, and that at the time of the accident there were spare links in the caboose and on the engine, and that it was the duty of the plaintiff's intestate, who was the conductor of the train, to see that there was a supply of links on his train. Another of his witnesses testified that he did not know that a conductor had any duty to have spare links on his train, but that the defendant had a sufficient number of links for use at Nashua, where the train was made up. There was no evidence that the company failed to supply all the links that were needed for coupling its cars at the places where the trains were made up. These links are not permanently fastened to the cars, but may be taken out and put in by the hand, as trains are divided or made up. They are furnished for use by trainmen, and by those who make up the trains in the freight yards. These men are fellow-servants of the conductors of freight trains. In *Thyng v. Railroad Co.*, 156 Mass. 13, 30 N. E. 169, is the following language: "Upon the undisputed evidence, the men who made up the trains could easily have got a longer pin in the yard or from the caboose which was going with the train. When proper pins for the coupling of cars are supplied, the failure to use them properly, or to replace one too short by a longer one, was the fault of the defendant's servants who used them, and not of the defendant. * * * The fact that a freight train broke apart when it ought not to is some evidence of negligence, for which the railroad would be liable in a suit brought by one who is not an employee; but, if nothing more appears, it does not indicate negligence of the corporation, for which it is liable to one of its servants, as distinguished from negligence of a servant, for which it is not liable to another servant. In a case like the present, where the only culpable cause to which the accident can be ascribed is the use of too short a coupling pin on a car of another corporation, it points to negligence of a fellow-servant quite as much as to the negligence of the corporation itself." With the substitution of the word "link" for "coupling pin," this language is applicable to the present case. See, also, *Carroll v. Telegraph Co.*, 160 Mass. 152, 35 N. E. 456; *Allen v. Iron Co.*, 160 Mass. 557, 36 N. E.

581; *Johnson v. Towboat Co.*, 135 Mass. 209; *Rice v. King Philip Mills*, 144 Mass. 229, 11 N. E. 101; *McGee v. Cordage Co.*, 139 Mass. 445, 1 N. E. 745. The evidence does not show that the law of New Hampshire differs from that of Massachusetts in this particular. Exceptions overruled.

KANZ V. PAGE.

Supreme Judicial Court, Massachusetts, March, 1897.

MASTER AND SERVANT — ASSUMPTION OF RISK. — Where a fly-wheel exploded in an engine-room and shortly afterwards an employee was sent into the room to clear away the ruins and was injured by iron that had lodged in the ceiling falling upon him the employer was not liable though the room was not inspected before the employee was sent in.

FROM Superior Court, Suffolk County. The court directed a verdict for defendants at close of plaintiff's case and plaintiff brings exceptions.

HARRIMAN & DAGGETT and D. PHILIP WARDNER, for plaintiff.

ARTHUR H. WELLMAN and DICKSON & KNOWLES, for defendants.

HOLMES, J.—This is an action for personal injuries caused by the fall of a piece of iron upon the plaintiff's head from the ceiling of a room in the defendant's factory. There are counts at common law and under the employer's liability act, but, in the view which we take of the case, nothing turns upon the distinction. The facts were that a fly-wheel had exploded in the engine-room, and the plaintiff was sent into the room to clear out the rubbish. We assume that this order was given by the defendants' superintendent, and that the defendants knew that the plaintiff was there. The defendants also knew the shattered condition of the room, which was obvious, but did not know that there was any iron likely to fall from the ceiling. While the plaintiff was at work the iron fell upon him. The plaintiff's position is that it was the defendant's duty to examine the place more fully than he had done before sending him in there, and that the plaintiff had a right to rely to some extent upon his or the superintendent's having done so before sending him to work.

We are of opinion that the principle referred to does not apply to the case. Obviously, there are limits to the duty of employers to provide for the safety of their workmen,—limits set by what is practicable in a commercial sense, and limits set by what naturally is to be expected under the circumstances. The chief sphere of the

duty is in the permanent or recurring conditions of the machinery or place where the workman is employed, so far as it is under the employer's control, where the danger is not obvious or necessarily incident to the business. An extreme example is *Burgess v. Ore Co.*, 165 Mass. 71, 42 N. E. 501. But there are many momentary dangers, which, though hidden, it is impracticable to guard against by inspection, and for which, on this ground, the employer is held not liable. *Whittaker v. Bent* (Mass.), 46 N. E. 121 (1). There are others which, even if permanent conditions of the business are obvious without warning, and of which the workman must take the risk if he accepts employment there. *Leary v. Railroad Co.*, 139 Mass. 580, 587, 2 N. E. 115; *O'Maley v. Gaslight Co.*, 158 Mass. 135, 32 N. E. 1119. There are others which are both transitory and obvious, or at least equally easy to be discovered by employer and employed. When a room has been shattered by an explosion, it is plain to everybody that things are not in their normal condition, that the usual support of part by part has been shaken or interfered with, and that some portion may have been weakened to the point of being ready to fall. If the explosion was of an iron wheel, it is plain that the fragments probably have flown in different directions, and that they may have lodged above or below. When a workman is sent into such a room on the day of the explosion to clear away the ruins, it is manifest that he is taking one of the steps which are necessary to disclose just what has happened. It is not a natural inference on the part of one so sent that the place has been inspected, and it is not a natural interpretation of the order to take it as implying that the superior knows that it is safe. Such an inference and interpretation are not based on the experience of life. They are mere deductions from the letter of an inaccurately stated rule of duty, assumed beforehand to cover the case. Some one must be first in the place of possible danger. The workman sent in to clean it up has no right to assume that he is not the first, nor is the employer bound in formal language to notify him that no one as yet has made certain that nothing will give way.

Exceptions overruled.

1. *Whittaker v. Bent* (Mass.) is reported in 1 Am. Neg. Rep. 455, *ante*.

BARNARD v. SCHRAFFT.

Supreme Judicial Court, Massachusetts, March, 1897.

MASTER AND SERVANT—RISK OF EMPLOYMENT.—Where it appeared that an experienced candy-maker, who had worked for years at a furnace where rings were used for the use of different sized kettles, was put at work at another furnace not constructed for the use of rings, and after working there for six weeks, was ordered to use a ring from the old furnace to accommodate different sized kettles, and there being no groove to hold the ring he laid it loosely over the opening, and when the kettle was removed the ring clung to it, unnoticed by him, and soon fell to the floor and his foot caught in it and in trying to escape the molten sugar was spilled on his hand, the employer was not liable for the injuries though the employee testified that he did not know of the danger of using the ring on the furnace, as the risk was obvious.

FROM Superior Court, Suffolk County. The court directed a verdict for defendant, and plaintiff brings exceptions.

W. H. BAKER, EDWARD LOWE, and L. N. BENNETT, for plaintiff.
JOHN LOWELL, Jr., and JOHN A. BLANCHARD, for defendant.

ALLEN, J.—According to the testimony introduced by the plaintiff, there were in common use in candy manufactories two kinds of furnaces for melting sugar,—one kind being the ring furnace, which had been in use in the defendant's factory till about six weeks before the accident; the other kind being the Fobes-Hayward furnace, which was not used nor adapted for use with rings. The furnace in use at the time of the accident was one of the latter kind, and had been purchased about six weeks before the accident, and had been in use after that time. The plaintiff had worked at the candy business thirty years, and about three years for the defendant, and had worked on the Fobes-Hayward furnace in question every day during the six weeks before the accident. This furnace had no rings which belonged to it, and was not adapted for use where kettles of different sizes were required; but in the defendant's business it was necessary to use kettles of different sizes, and accordingly the defendant's son told the plaintiff to use the rings from the old furnaces, and the plaintiff selected from the old rings one adapted to the kettle in use at the time. In removing the kettle full of melted sugar from the furnace the ring clung to it. This was not observed by the plaintiff, and shortly afterwards the ring fell to the floor at his feet. The plaintiff got tangled in it, and, in trying to escape or disengage himself from the ring, the sugar was spilled on his hands, and burned his right hand very badly. The plaintiff's counsel stated at the trial

that the furnace and ring were not safe and suitable appliances, because the ring, being placed on top of the furnace, and not fitted or grooved into the top as in a proper ring furnace, was not properly fastened down, and that in proper ring furnaces the rings are held in place, not only by their own weight, but by being closely fitted to the furnace top, and by the expansion of the iron when heated. Assuming this to be so, the only danger from using the furnace and the ring was that the ring would cling to the kettle, and come off with it when the kettle should be removed. That this might happen was obvious. There was nothing to prevent it, except the weight of the ring. No doubt more care was required in using this furnace, with the ring simply placed on top of it, than in using a furnace with rings so adjusted as to be securely held in place. But the conditions were all well known to the plaintiff. The ring was selected by himself, and laid upon the top of the furnace. There was no concealed or latent peril. The plaintiff knew that there was nothing to hold the ring down except its own weight. He was, moreover, a candy-maker of long experience, and had been at work upon this particular furnace every day for six weeks. The risk, such as it was, was obvious. The ring came off with the kettle, and the plaintiff did not notice it, and thus the accident happened. The plaintiff testified that he did not know or understand that there was any danger of injury to himself until after he was injured. But the elements of danger were known by him, and we are of opinion that he was lacking in due care, either in failing to take notice that the ring might come off with the kettle, or in failing to observe that in point of fact it had so come off in this instance. *Goldthwaite v. Railway Co.*, 160 Mass. 554, 36 N. E. 486; *Connors v. Morton*, 160 Mass. 333, 35 N. E. 860. Exceptions overruled.

BROOKS v. OLD COLONY RAILROAD COMPANY.

Supreme Judicial Court, Massachusetts, March, 1897.

KNOCKED DOWN BY RUNAWAY HORSE ON STATION PLATFORM.—

Where it appeared that a passenger was standing upon the platform of a way station of a railroad, that crossed a nearby street, at grade, and that a train having just come in, the gates on each side of the track were down, and that a runaway horse broke through the first gate, stopped a little at the second, passed between the locomotive and a telegraph post, a space not over four feet in width, and went upon the platform and knocked the passenger down, there was no evidence of negligence on the part of the carrier.

FROM Superior Court, Suffolk County. The court directed a verdict for the defendant, and plaintiff brings exceptions.

CHARLES W. BARTLETT and HENRY F. NAPHEN, for plaintiff.

BENTON & CHOATE, for defendant.

The plaintiff was standing upon the platform of the defendant's railroad station at the Roxbury crossing, waiting to take a train for which she had a ticket. It is not in controversy that she is to be regarded as a passenger. A much traveled public street (Tremont street) crossed the railroad at grade close by the station. Gates were down on each side of the track, as the train had just come in. A runaway horse came along the street, broke through the first gate, stopped a little at the second, turned towards the station, passed between the locomotive engine and a telegraph post (a space not over four feet in width), and came upon the platform, and threw down and injured the plaintiff. The question is whether on the evidence the plaintiff was entitled to go to the jury upon the defendant's negligence.

The test of the defendant's responsibility for this accident is whether the defendant was reasonably bound to anticipate that such a thing might happen and to take some special precautions against it. The accident arose from a cause wholly outside of the operations of the defendant. The plaintiff was not in a car, but on the platform. The horse was not in the defendant's care or use, and was not led to run away by anything done by the defendant. If the horse had run upon the sidewalk of Tremont street, and hurt persons traveling thereon, nobody would have thought of seeking to hold the city responsible. It is well known that it is not the custom to fence in railroad platforms for passengers at way stations. Looking at the matter in the light of experience, of custom and of statutory requirements, merely arranging a platform of a station in such a manner as to make it possible for horses to come upon it, is of itself no evidence of negligence. Moreover, having special reference to the facts of the present case, it is not to be overlooked that the horse gained access to the platform upon which the plaintiff stood only by passing through a space of not over four feet in width, between the locomotive engine and a telegraph pole; this being at the time the only way in which he could reach the platform from the place where he stopped at the second gate. No case bearing upon the subject and making the carrier liable has been called to our attention. In *Smith v. Railway Co.*, L. R. 2 C. P. 4, the plaintiff, while waiting at the station for a train, was bitten by a stray dog, and it was held that there was no evidence for the jury of the defendant's negligence. As to the general duties of carriers, see *Dodge v. Steamship Co.*, 148 Mass

207, 19 N. E. 373 (1); *Moreland v. Railroad Co.*, 141 Mass. 31, 6 N. E. 225 *ad finem*; *Sinkin v. Railway Co.*, 21 Q. B. Div. 453. While it is conceivable that a very quick-witted and active man might have caught hold of the horse as he stopped, the failure of the gate-tenders to do so is such extremely slight evidence of any negligence which could be imputed to the defendant that the presiding judge was justified in disregarding it altogether. It would not support the burden of proof that rested upon the plaintiff. *Shea v. Wellington*, 163 Mass. 364, 372, 40 N. E. 173; *Buswell v. Fuller*, 156 Mass. 309, 31 N. E. 294; *Treat M'f'g Co. v. Standard Steel and Iron Co.*, 157 U. S. 674, 15 Sup. Ct. 718.

Exceptions overruled.

Opinion by ALLEN, J.

WELCH v. GRACE.

Supreme Judicial Court, Massachusetts, February, 1897.

MASTER AND SERVANT—DEFECTIVE APPLIANCE.—A workman who is killed by the explosion of a dynamite cartridge, that remained undischarged after a blast in which other cartridges connected therewith were exploded, is not killed by a defect in the "ways, works or machinery" of the employer, within the meaning of St. 1887, c. 270, § 1, giving a right of action to the widow or next of kin of the deceased.

KILLED BY EXPLOSION OF DYNAMITE IN QUARRY.—Where an employee, for several years employed in defendant's quarry, and familiar with the use of dynamite cartridges, having found an unexploded cartridge frozen in one of the holes, so informed the defendant, who told the employee to pour hot water in the hole and to ask advice of a fellow-workman, who gave the employee the same advice as the defendant, and neither gave any further instructions, and the employee was killed, while endeavoring to draw the cartridge, after it was thawed out, by its explosion, the defendant was not liable.

EXCEPTIONS from Superior Court, Suffolk County.

FRANCIS BURKE, for plaintiff.

JOHN LOWELL and JOHN LOWELL, JR., for defendant.

This was an action by Nora Welch against Patrick Grace for damages under the statute for the death of her husband while he was in defendant's employment. The court directed a verdict for the defendant and the plaintiff brings exceptions. The deceased had worked for the defendant about three years, as a laborer barring

1. *Dodge v. Boston & Bangor S. S. Co.*, 148 Mass. 207, is reported in 3 Am. Neg. Cas. 843.

out stone, loading teams, etc., and had drilled holes in the ledge and had loaded the small holes and discharged the blasts therefrom, but, so far as defendant knew, the deceased knew nothing about the large blasts. The way the large blasts would be set off was that after a large number of holes had been drilled by steam in the ledge, there would be placed in each of them seven or eight dynamite cartridges and in the top cartridge a cap, which would be connected with two electric wires which connected with the wires from the other holes, and all the wires were connected with an electric battery placed at a safe distance from the ledge; the lever of this battery would be lowered by William Grace, who acted as foreman of the ledge, and immediately all the blasts would go off together. There was evidence tending to show that about a week before the accident a range of blasts had been discharged in the above manner under the direction of William Grace, who was absent from the ledge on the day of the accident, and the defendant had charge. The deceased, who, with other men barring out stone loosened from the ledge by the blast, came to the defendant and told him that he had found a hole that had missed at the time of the blast. The defendant testified that he told the deceased to pour some hot water into the hole to thaw out the cartridges that the deceased said were frozen, and that he then told deceased to see Donovan, who would tell what to do. Donovan was a worker who was thought by the defendant to know more about the matter than either the defendant or the deceased. Donovan testified that the deceased came to him and he told the deceased to pour hot water on the cartridges. It would take about twenty minutes to thaw them out. After the deceased poured the hot water in the hole the witness Donovan saw him at the hole with a spoon in his hands. The spoon is used to draw the charge. In a minute or two after the witness saw the deceased put the spoon in the hole, the blast went off and the deceased was thrown fifteen or twenty feet, his body all mangled and his legs blown off.

This action is brought under St. 1887, c. 270, § 2, which provides that "where an employee is accidentally killed or dies without conscious suffering as the result of the negligence of an employer or the negligence of any person for whose negligence an employer is liable under the provisions of this act, the widow of deceased, or in case there is no widow, the next of kin * * * may maintain an action for damages therefor," etc. The plaintiff contends that the death of her husband was caused by a defect in the "ways, works or machinery" of the defendant, within the meaning of these words as used in the first section of this act. But we are of the opinion that this contention cannot be maintained. There was no defect in any of the

machinery, tools or appliances used in the defendant's business. The finding of the cartridges undischarged was merely a condition of the material upon which the employees were working, caused by their work and necessarily incident to the business in which they were engaged. It was in no proper sense a defect in the ways, works or machinery of the defendant. *Lynch v. Allyn*, 160 Mass. 248, 252, 35 N. E. 550; *Shea v. Wellington*, 163 Mass. 364, 369, 40 N. E. 173; *Willets v. Watts* (1892) 2 Q. B. 92 (1); *McGiffin v. Iron Co.*, 10 Q. B. Div. 5 (2).

The defendant contends that under the provision above quoted, there cannot be a recovery for an injury resulting from negligence of an employer except in those cases in which the negligence comes within the provisions of section 1 of this chapter. But we are of the opinion that the clause "under the provisions of this act" qualifies only the clause "any person for whose negligence the employer is liable," and does not limit the preceding clause "as the result of the negligence of an employer." The effect of the section is to give a right of recovery whenever a person is accidentally killed, or dies without conscious suffering as the result of any negligence of the employer himself, but not to give the right when a death occurs from the negligence of an employee unless the negligence is of a kind that would subject the employer to a liability, under the first section of the statute, if the deceased person had been injured, and had survived. There was no evidence of any negligence in failing

1. In *Willets v. Watts*, 2 Q. B. 92, it appeared that by sec. 1, subsec. 1, of the Employer's Liability act, 1880, a right of compensation is given to a workman, for personal injury, caused to him by reason of any defect in the condition of the ways connected with or used in the business of the employer. The plaintiff was employed by the defendants, as a workman, in a large workshop, where there was a catchpit, generally covered with a lid. The lid was removed for a temporary purpose, and the plaintiff, in passing from one part of the shop to another, in the course of his business, fell into the catchpit and was injured. *Held*, that the whole floor of the shop, where the plaintiff was passing, was a way, within the meaning of the act, but that the removal of the cover from the well did not constitute a defect in the con-

dition of the way within the meaning of the section, and that, consequently, the defendants were not liable.

2. In *McGiffin v. Iron Co.*, 10 Q. B. Div. 5, a workman was employed in the defendant's iron works, and part of his duty was to take iron in balls, by means of a two-wheeled car, along a roadway of iron plates. While he was so engaged, the car struck against a piece of a substance used for lining the furnaces, which had been negligently placed projecting into the roadway, and a ball fell upon him, causing personal injuries, from which he died. *Held*, that the obstruction, caused by the substance projecting into the roadway, was not a defect in the condition of the way within the meaning of Employer's Liability act, sec. 1, subsec. 1, and defendants were not liable.

to furnish proper machinery, tools or appliances for use in the business in which the plaintiff's husband was engaged. All the evidence indicates that the deceased was familiar with the use of dynamite cartridges, and there is no evidence that the defendant had any reason to suppose that on the day of the accident he needed any instruction or warning in regard to the danger from an improper use or treatment of them.

We are of the opinion that there was no evidence that the defendant owed the plaintiff's husband any duty to give him warning or instruction or that he gave him any improper direction.

Exceptions overruled.

Opinion by KNOWLTON, J.

ROBBINS v. ATKINS.

Supreme Judicial Court, Massachusetts, February, 1897.

LANDLORD AND TENANT—UNSAFE PREMISES.—Where a tenant was injured by the giving way of the cellar stairs, the support of which had been dug away by a contractor employed by the landlord to make repairs, the landlord was liable.

FROM Superior Court, Suffolk County. There was a verdict for plaintiff and the defendant brings exceptions.

WILLIAM A. MORSE, for plaintiff.

HENRY E. FALES and STEPHEN H. TYNG, for defendant.

This is an action by one of the occupants of an upper story in a house against the landlord for injuries received in consequence of the cellar stairs giving way as she was passing over them. The cellar staircase was a common passageway, for which the defendant had the usual responsibility of a landlord. The probable cause of the collapse was that a contractor employed to dig down the cellar, had removed the earth which supported the staircase. The defendant's responsibility was not limited to cases where he had made the stairs unsafe by his own act, although the intervention of a contractor might not prevent the danger being attributed directly to him, *Woodman v. Railroad Co.*, 149 Mass. 335, 340, 21 N. E. 482, but he was bound to use reasonable care to keep or to restore safety.

The testimony was that he came to the house quite often, and so probably knew in a general way, at least, the state of the work. And, whether he did or not, the most natural inference from the contract was that it contemplated just what happened. If so, it

was the defendant's duty to see that care was taken to shore up the staircase, or to warn the tenants. *Lindsey v. Leighton*, 150 Mass. 285, 22 N. E. 901.

Exceptions overruled.

Opinion by HOLMES, J.

GRAY V. BOSTON & MAINE RAILROAD.

Supreme Judicial Court, Massachusetts, February, 1897.

CARRIER AND PASSENGER.—Where a woman was injured in the passageway leading to defendant's waiting-room, by a drunken person, who was being ejected by an employee, being forced violently against her, and she was afterwards helped to the waiting-room and took a train for her home, and she testified that she had traveled over the road for fifteen years and had used the passageway a great many times, there was sufficient to warrant the inference that she was a passenger, and the company was liable.

SCOPE OF EMPLOYMENT.—Evidence that the employee was especially employed to keep the men's waiting-room and closet in proper condition, and that it was part of his duty to keep them clear from loafers, was sufficient to show that he was acting within the scope of his authority, and defendant was liable, though the employee exceeded his detailed instructions.

EXCEPTIONS from Superior Court, Middlesex County.

The declaration, after stating the incorporation of defendant, and the usual formal parts, proceeds: "The plaintiff, in the exercise of due care, on or about the 24th day of April, 1894, at the invitation and request of said defendant corporation to become a passenger on said trains, and for the purpose of becoming a passenger on one of the said defendant's trains between said Boston and said Stoneham, entered said station of the defendant corporation through the entrance leading from said Causeway street into said station provided for passengers; but the defendant corporation, by its servants, so carelessly and negligently managed and provided said entrance into said station, and so carelessly and negligently ejected from said station, by force and violence, some person unknown to the plaintiff, and while so negligently and carelessly ejecting said person, while the plaintiff was in said entrance of said station for the purpose of being carried as a passenger to Stoneham by said defendant, forced said person with force and violence against and upon said plaintiff, whereby said plaintiff received severe bodily injuries."

M. T. ALLEN and J. H. MURPHY, for plaintiff.

GEORGE F. RICHARDSON, GEORGE R. RICHARDSON and DANIEL M. RICHARDSON, for defendant.

ALLEN, J.—The defendant contends that there was no evidence that it failed to use reasonable care in the management of the passage. This passage or corridor was a central entrance for passengers and others who were within the implied invitation of the defendant to enter the station, and it was the defendant's duty to use reasonable care to keep it safe for them. The trouble came, not from the unexpected act of a stranger, but from the act of one of the defendant's servants in ejecting a drunken man. The defendant suggests that the danger of injury of this kind was so remote and improbable that it could not reasonably have been anticipated. This argument would have more force if the act causing the injury had come from a stranger. But it might be found to be negligent management not to keep the corridor free from violent acts of the defendant's own servants which were dangerous to persons entering there for legitimate purposes. The defendant also argues that there was no evidence that the plaintiff was a passenger. She testified that she had traveled over this road for fifteen years, had passed through this passage a great many times, and that after the accident she was helped to the waiting-room for ladies, and took the train for home. In the absence of anything to the contrary, it might be inferred that she was within the defendant's implied invitation to enter there. The defendant further contends that there was no evidence that their servant was acting within the scope of his employment in ejecting the drunken man. There was evidence tending to show that he was employed specially for the purpose of keeping the men's waiting-room and closet clean and in proper condition, and that it was a part of his duty to keep the room and closet clear from loafers. The jury might well find from the evidence that in ejecting the drunken man the servant was not "on a frolic of his own" (*Joel v. Morison*, 6 Car. & P. 501) (1), but was engaged in doing what he was employed to do. If this was so, and if his act of ejecting the drunken man was done for the purpose or as a means of keeping the men's waiting-room clear from persons in that condition, then the defendant might properly be held responsible, even although he might have exceeded his detailed instructions. *Southwick v. Estes* 7 Cush. 385; *Howe v. Newmarch*, 12 Allen, 49; *Bowler v. O'Connell*, 162 Mass. 319, 38

1. In *Joel v. Morison*, 6 C. & P. 501 it was held (per PARKE, B.,) that if a servant, in driving his master's cart, on his master's business, makes a detour from the direct road for some purpose of his own, his master will be answerable for any injury occasioned by his negligent driving while so out

of the road. But if a servant takes his master's cart without leave, at a time when it is not wanted for the purpose of business, and drives it about solely for his own purposes, the master will not be answerable for any injury which he may do.

N. E. 498, and cases there cited. The defendant now suggests that it did not appear at the trial that the drunken man came from the men's waiting-room or closet. A door opened from the corridor into that waiting-room, two other doors into the general waiting-room, and one, at the end of the corridor, into the barber shop. So far as appears, no doubt was expressed at the trial that the drunken man had been in the men's waiting-room or closet, and the defendant's servant was not called as a witness. The servant was apparently acting in the performance of what he thought to be his duty, and, in the absence of anything to show the contrary, or any question raised upon the point at the trial, it might be inferred that the drunken man was found in the men's waiting-room or closet, rather than in the barber shop or general waiting-room. There was no error in submitting the case to the jury.

Exceptions overruled.

RUCHINSKY V. FRENCH ET AL.

Supreme Judicial Court, Massachusetts, February, 1897.

MASTER AND SERVANT—DANGEROUS APPLIANCE.—Where it appeared that the plaintiff, a woman thirty years of age, was injured by having her hand caught in cog wheels that were in plain sight on the side of a machine at which she was working and there was no hidden danger, the defendant was not liable, though she was unfamiliar with machinery and had not been warned of the danger of the cog wheels.

NEGLIGENCE—DIRECTION OF EMPLOYER.—The fact that her employer, who was working with her on the other side of the machine, had told her to work "quick" was not evidence of negligence on his part.

FROM Superior Court, Essex County. The court directed a verdict for defendant, and plaintiff brings exceptions.

EDMUND B. FULLER, for plaintiff.

BOYD B. JONES and MELLEN A. PINGREE, for defendants.

LATHROP, J.—The plaintiff in this case does not contend that the defendants were in fault in not guarding the cog wheels. Her contention is that she should have been warned, when set to work upon the machine, that there were cog wheels upon the sides, and that, if she got her hands into them, she would be hurt. The cog wheels were in plain sight, and there was no hidden danger. The plaintiff was thirty years old, and of ordinary intelligence. While she testified that she knew nothing of the dangers of the machine, and the exceptions state that she was unfamiliar with machinery, the

defendants had a right to assume that she had that knowledge which is acquired by common experience, and were under no obligation to warn her that, if she put her hand between revolving cog wheels, she would be hurt. *Ciriack v. Woolen Co.*, 151 Mass. 152, 156, 23 N. E. 829, and cases cited; *Stuart v. Railway Co.*, 163 Mass. 391, 40 N. E. 180.

The work which the plaintiff was set to do was pulling squares of leather through a machine, and placing them on the floor. The plaintiff contends that the case should have been submitted to the jury, because one of the defendants told her to work "quick," and she hurried in her work; and, after she had pulled a few pieces of leather through, her hand was caught. But we do not see that the fact that she was told to work "quick" was, under the circumstances of the case, evidence of negligence on the part of the defendants. *Ciriack v. Woolen Co.*, 146 Mass. 182, 15 N. E. 579.

Exceptions overruled.

POWERS v. CITY OF FALL RIVER.

Supreme Judicial Court, Massachusetts, February, 1897.

MASTER AND SERVANT—RISK OF EMPLOYMENT.—Where the plaintiff, a laborer, was injured by the fall of a tripod used to hoist stones out of a trench that he was digging, the city was liable, where it appeared that the foreman was negligent in not using a derrick instead of the tripod.

FROM Superior Court, Bristol County. Verdict for plaintiff. Defendant brings exceptions. The plaintiff was a laborer engaged in digging a trench for city water pipes, and it was part of his duty to assist in hoisting a large rock out of the trench. While so employed the apparatus and rock fell into the trench, drawing the plaintiff with them.

J. W. CUMMINGS, for plaintiff.

L. E. WOOD, for defendant.

LATHROP, J.—The work which was going on at the time of the injury to the plaintiff was under the direct supervision and control of a foreman of the defendant, who, it is conceded, was a superintendent, within the meaning of the statute, and there was evidence that his sole duty was that of superintendence. The plaintiff did precisely what he was told to do, and it is not contended that he was not in the exercise of due care. There was evidence of negligence on the part of the superintendent in at least two particulars: First,

in using the tripod instead of the derrick in hoisting so large a stone out of the trench; and, secondly, in not putting planks across the trench under the stone, after it had been hoisted above the surface of the ground. If this had been done, the stone could have been lowered to the planks and removed without further use of the tripod. The swinging in of the stone to the surface of the ground would then have been unnecessary, and the catastrophe would have been avoided. The principal contention of the defendant at the argument in this court was that the plaintiff took the risk. He undoubtedly took the ordinary risks of his employment, but it cannot be said, as matter of law, that the falling of the tripod into the trench was an ordinary risk. It was for the foreman to determine which appliance to use,—the tripod or the derrick. The plaintiff had a right to rely to some extent upon the experience of the foreman, even if he knew all the conditions, which does not clearly appear. On all the evidence, we are of opinion that the question whether the plaintiff assumed the risk was for the jury. *Haley v. Case*, 142 Mass. 316, 7 N. E. 877; *Lang v. Terry*, 163 Mass. 138, 39 N. E. 802; *Coan v. City of Marlborough*, 164 Mass. 206, 41 N. E. 238; *Morton v. City of New Bedford*, 166 Mass. 48, 43 N. E. 1034.

Exceptions overruled.

BURNS v. STUART.

Supreme Judicial Court, Massachusetts, February, 1897.

BITTEN BY A DOG—EVIDENCE.—In an action for injuries caused by the bite of a dog, the exclusion of a license offered in evidence to corroborate his statement that he did not own a dog of the description that bit the plaintiff, was proper.

EXCEPTIONS from Superior Court, Suffolk County. A verdict was rendered for plaintiff.

TIMOTHY W. COAKLEY, for plaintiff.

JAMES A. MCGEOUGH, for defendant.

HOLMES, J.—This was an action for tort for the bite of a dog. The dog which bit the plaintiff was described in the testimony as a bull terrier or bull dog, weighing about fourteen pounds, and of a light color, with a spot. The defendant denied that he owned the dog described, and testified that the only dog which he ever owned was a fox terrier, weighing about ten pounds, white, without a spot; that he owned this dog while living in Somerville, as he had done

until about two weeks before, and that he had had it licensed there. He identified and offered the license. It was excluded, and the defendant excepted.

Presumably, the description of the dog in the license was given to the city clerk by the defendant. There might be circumstances where the fact that he had made such a declaration before the existence of the present interest would be material. See *Murchie v. Cornell*, 155 Mass. 60, 63, 64, 29 N. E. 207. But, so far as appears in the exceptions, his testimony under oath would have gained no legal corroboration from his having said the same thing when not sworn, and not subject to cross-examination. See *Sewall v. Sewall*, 122 Mass. 156, 163.

Exceptions overruled.

BRAITHWAITE v. HALL.

Supreme Judicial Court, Massachusetts, February, 1897.

BICYCLE RIDER INJURED IN COLLISION — PLEADING.—A declaration that alleges that the plaintiff, while riding his bicycle in the street named, and while in the exercise of due care, was run over by defendant's horses and carriage, negligently driven by a servant of defendant while acting in the scope of his employment, whereby plaintiff was injured and his bicycle demolished, states a good cause of action and is not demurrable on the ground of joining two separate causes of action.

MEASURE OF DAMAGES.—In an action for personal injuries, the wages actually lost are the damages sustained, and the damages are not to be measured by the market value of the average wages of a man of plaintiff's average capacity working in the same employment.

EXCEPTIONS from Superior Court, Middlesex County. The declaration states: "And the plaintiff says that on the 30th day of May, 1895, while riding his bicycle on Mount Vernon street, in the city of Cambridge, in this commonwealth, and while in the exercise of due care, he was run over by the defendant's horses and carriage, negligently driven by a servant of the defendant while acting in the scope of his employment, whereby the plaintiff was severely injured, made sick, put to great expense and loss of time, and whereby his bicycle was demolished." Defendant demurred and answered, alleging contributory negligence. There was a verdict for plaintiff.

D. D. CORCORAN, for plaintiff.

JOHN T. SIMMONS, for defendant.

HOLMES, J.—The demurrer must be overruled. The meaning

of the declaration is plain and sufficient. Nowadays we do not require pleadings to be guarded against all the possible distortions of perverse ingenuity. The single collision which caused the damage to the plaintiff's person and to his bicycle was one cause of action. "*Un trespasse ne serra mye deux foitz puny.*" *Doran v. Cohen*, 147 Mass. 342, 344, 17 N. E. 647; *Bliss v. Railroad Co.*, 160 Mass. 447, 455, 36 N. E. 65.

The ruling as to damages was correct. It is true that, when a man is allowed to prove his average earnings or the wages actually lost by him, they are proved as a measure of the value of the time and power to labor, of which he has been deprived, not as themselves recoverable *eo nomine*. But the distinction does not appear to be material in this case. There is nothing to show that the wages were not reasonable, and a proper measure of the value of the plaintiff's time. It is argued for the defendant that the true measure is the market value of the average wages of a man of the plaintiff's average capacity, working in the same employment. But the cases cited do not sustain the position, and there are many decisions adopting the test of the individual's experience. If any distinctions in the value of men's time are admitted, there is no reason why the whole actual difference should not be recognized. To this extent a tortfeasor takes the risk of the value of what he destroys. *Murdock v. Express Co.* (Mass.) 46 N. E. 57 (1), and cases cited. See, also, *Railway Co. v. Frantz*, 127 Pa. St. 297, 308, 18 Atl. 22.

Demurrer overruled.

Exceptions overruled.

WILLEY v. BOSTON ELECTRIC LIGHT COMPANY.

Supreme Judicial Court, Massachusetts, February, 1897.

ACTION FOR DEATH, CAUSED BY ELECTRIC LIGHT WIRE—EVI-

DENCE.—In an action under St. 1887, c. 270, secs. 1, 2, for causing death of plaintiff's husband by a defect in the condition of an electric light company's works and machinery, where it appeared that the insulation of a wire was burned off; that a night lineman found the pole where the electricity was escaping; that he went to the station and had the electricity shut off; that he then returned and by pushing the handle of cut-out box on the pole made it impossible for the electricity to reach that pole; that the electricity was then turned on, lighting all the lamps on the circuit, except the one on

1. *Murdock v. N. Y. & Boston Despatch Express Co.* (Mass.), is reported in 1 Am. Neg. Rep. 263, *ante*.

the pole in question; that the plaintiff's husband, a night patrolman, not knowing of the trouble, climbed the pole, turned on the electricity by means of the cut-out box, as was his duty when he found a lamp turned off, and received a shock which caused him to fall and he was killed, it was proper to admit evidence that after the accident another employee cut the wires running into the cut-out box and joined them above and so cut off the electricity entirely from the pole, and a verdict for the plaintiff was sustained.

FROM Superior Court, Suffolk County. Judgment for plaintiff. Defendant brought exceptions.

WILLIAM N. OSGOOD and JOHN L. BATES, for plaintiff.

EVERETT W. BURDETT and CHARLES A. SNOW, for defendant.

- . This is an action under St. 1887, c. 270, secs. 1, 2, for causing the death of the plaintiff's husband by a defect in the condition of the defendant's works and machinery. The insulation of the defendant's wire was burned off by lightning near the pole where the accident happened. At ten minutes past seven it was discovered that there was trouble, and one Murphy, a night lineman was sent out. He found the pole where the electricity was escaping, went back to the station, and had the electricity shut off from the circuit. He then returned, and, by pushing the handle of a cut-out box on the pole, made it impossible for the electricity to reach that pole. He then went back again to the station, and the electricity was turned onto the circuit, lighting all the lamps except the one upon the pole in question. At about a quarter before nine, the plaintiff's husband, a night patrolman, not knowing that there had been trouble, climbed up the pole, turned on the electricity by means of the cut-out box, as it was his duty to do when the trimmers had left it turned off, and received a shock, which caused him to fall to the ground, and in that way killed him. The main question is whether there was a case for the jury.

It may be assumed that it would have been impossible to discover and to remedy the damage to the insulation that night. All that was known was that for some reason the electricity was escaping at that pole. But it was proved, subject to the defendant's exception, that an hour or two later another of the defendant's men cut the wires running into the cut-out box and joined them above the box, and in that way cut the electricity off from the pole; and it was argued that in view of the probability of unwarned patrolmen doing just what the deceased did, this course should have been adopted by Murphy. We are of the opinion that the evidence was admissible to show what was possible for Murphy, and that the argument was proper for the consideration of the jury. As the presiding judge very properly ruled, the words "defect in the condition of the

machinery " do not refer to its working capacity, but to its condition with regard to the safety of the employees. So, when the statute goes on to speak of the defect not having been remedied, it does not mean that the machine must have been made perfect for working purposes, but that its dangerous condition must have been ended. This may be done by a temporary device as well as by permanent repairs. As to the care shown by the deceased the question was for the jury.

Exceptions overruled.

Opinion by HOLMES, J.

CANFIELD v. CITY OF JACKSON.

Supreme Court, Michigan, March, 1897.

DEFECTIVE SIDEWALK — EVIDENCE.— In an action against a city for injuries sustained by reason of a defective sidewalk, evidence of the condition of the walk in the vicinity of the accident at and prior to the time of its occurrence, was properly admitted.

NOTICE TO CITY — WAIVER.— Unless the defense that the plaintiff's claim for injuries was not presented to the city council, as the charter prescribed, is presented at the trial, it is waived.

FROM judgment of Circuit Court, Jackson County, in favor of plaintiff, defendant brings error.

J. H. PARKINSON, for appellant.

BLAIR, WILSON & BLAIR, for appellee.

The plaintiff recovered a judgment for injuries received because of a fall upon a defective sidewalk. The defendant appeals, and assigns as error the admission of testimony bearing upon the question of the extent of the injuries received by the plaintiff. It was alleged in the declaration that the plaintiff "stepped into one of said holes and was thereby thrown and fell to and upon the said sidewalk and the ground there, and thereby the spine of said plaintiff was severely and permanently injured, and she was otherwise severely hurt, bruised and wounded, and she became and was sick, sore and disabled and so remained," etc. We think the declaration was sufficiently broad to warrant the introduction of all the testimony which was received. The plaintiff was allowed to show the condition of the walk at and in the vicinity where the accident occurred, at the time of and prior to the accident. It is claimed this was error. The decisions of this court justified the admission of the testimony. *Will v. Village of Mendon* (Mich.) 66 N. W. 58;

Moore v. City of Kalamazoo, Id. 1089. Neither by the pleadings nor at the trial was any attempt made to defend against plaintiff's claim for the reason that it had not been presented to the common council. In December, after the trial, the circuit judge was asked to grant a new trial because the plaintiff had not presented her claim to the common council before suing it. We do not think it necessary to decide whether the charter provision is to be construed as controlled by the case of *Lay v. City of Adrian*, 75 Mich. 442, 42 N. W. 959, or by *Springer v. City of Detroit*, 102 Mich. 303, 60 N. W. 688. The defense sought to be interposed was a legal defense. The city and its counsel must be presumed to know the law. No one knew better than they whether the claim of plaintiff had been presented to the common council or not. Whatever the facts were, they knew them at the time of the trial. The attention of the court was not called to this defense during the trial of the case. It is too late now to seek to interpose it.

Judgment affirmed.

Opinion by MOORE, J.

BLAKESLEE v. CONSOLIDATED STREET RAILWAY COMPANY.

Supreme Court, Michigan, March, 1897.

COLLISION BETWEEN ELECTRIC CAR AND WAGON GOING SAME WAY BUT TOO NEAR THE TRACK.—Where it appeared that a driver of a wagon that was so loaded with barrels that he could not see behind it without leaning to one side, pulled in towards the track in order to pass a carriage standing by the curb, without attempting to look behind, and the barrels were struck by an electric car that came up behind and frightened the horses, causing them to run away, and the driver was injured, and there was evidence that the wagon traveled thirty-five feet within line of the car before it was struck and that the motorman when thirty feet from the wagon increased the speed of the car to six miles an hour thinking he had room enough to pass, the evidence was sufficient to warrant the jury in finding the company liable.

FROM judgment of Circuit Court, Kent County, in favor of plaintiff, defendant brings error.

KINGSLEY & KLEINHAUS, for appellant.

EARLE & HYDE, for appellee.

This case was in this court at the April term of 1895, was reversed, and remanded for another trial. The opinion filed is

found in 105 Mich. 462, 63 N. W. 401. Judgment was reversed upon the ground that the trial court did not properly instruct the jury upon the question of the plaintiff's contributory negligence. Speaking of that charge, it was said in the majority opinion: "This naturally tended to give the jury to understand that turning suddenly upon the track in front of an approaching car, so close that a collision would naturally ensue unless the motorman, by extremely prompt and vigorous action, should prevent, would not be contributory negligence, unless the plaintiff knew that the car was only a few feet away, and unless he could have reasonably ascertained the fact from his seat in front of the barrels. In other words, the charge seemed to imply that a man may place himself in any position that his convenience or the exigencies of his calling may require, and drive upon the track, without taking correspondingly greater precautions than would be necessary if in an open wagon; relying upon the proposition that he has the same right there that the car has, and that the motorman is required to avoid the collision. The evidence shows that the plaintiff made no effort whatever to ascertain whether a car was coming or not. In the case of a covered milk wagon this was held to be negligence, and the rule should be the same in this case. Whether or not this negligence contributed to the injury is another question which we cannot determine, it being for the jury." Upon the second trial the case was submitted to the jury upon the theory stated in the opinion of this court.

It is contended by counsel for defendant that in the former record there was evidence that the car was run at a high rate of speed, and the plaintiff was upon the track when the car was 100 feet away; but that in the present record it appears that the car was not moving at an unlawful rate of speed, and was going at a slower rate than the ordinance authorized; and, again, that there was no evidence given on the trial that the car was from thirty to fifty feet away when the plaintiff turned upon the track. It is conceded that the present record does not show that the car was being driven to exceed six miles an hour. This was the testimony given by the motorman, Johnson. But it is contended that fact would tend more strongly to show that the plaintiff was not guilty of contributory negligence; for one might be negligent in driving upon the track when the car was approaching at the rate of fifteen miles an hour if the car was in close proximity; while, if the car was running at the rate of only six miles an hour, he might not be guilty of negligence in driving upon the track. We think there is great force in this contention. From the plaintiff's testimony, it appears that he had traveled after turning upon the track, or at least within the line of

the car on the track, something like thirty-five feet before he was struck.

The contention is that there was no evidence that the motorman was guilty of any negligence, or that he ran the car at a dangerous rate of speed, or that he recklessly ran into the wagon. We need but refer to the testimony of the motorman to answer these propositions. If his testimony is true, he had full control of his car when within a wagon's length of the plaintiff's wagon, but increased his speed so that he could pass. This testimony, taken in connection with that of Groskoff's, that the wagon turned in towards the tracks while the car was from thirty-five to fifty feet distant, shows that the motorman was reckless under the circumstances.

Judgment affirmed.

Opinion by LONG, C. J.

BENNETT v. BUTTERFIELD.

Supreme Court, Michigan, March, 1897.

CUSTOMER FALLING DOWN FREIGHT ELEVATOR SHAFT IN STORE.—A customer, who, without invitation or permission, entered the door of a freight elevator, situated in the back part of the store and used by employees only, and the elevator not being there, fell down the shaft and was injured, was guilty of contributory negligence.

From judgment of Circuit Court, Wayne County, in favor of defendant, plaintiff brings error.

The defendant was a dealer in wall paper and occupied the ground floor, the basement, and the fifth floor of a store 120 feet long and forty feet wide. The ground floor was her salesroom and the fifth floor her storeroom, where she kept her surplus stock of goods. This floor was reached by an elevator, situated in the rear and at one end of the store, and was designed for the use of her employees only, and for the carriage of freight. There were wall paper cases seven feet high standing near and in front of the elevator and with their backs towards it. The elevator was inclosed from floor to ceiling with double doors opening into the store and two windows. The entrance was protected by a gate sliding in grooves on either side hung on ropes, running over pulleys by weights, and was raised and lowered by hand. The elevator was plainly marked with the words: "Elevator; danger; for freight only." The plaintiff, a paper-hanger, entered the store shortly before noon, in a hurry, to

buy some wall paper to finish a job. He had traded at this store for many years, and only once, some six years before the accident, and before the defendant occupied the store, had he ridden upon this elevator. The plaintiff testified that he asked a clerk where a certain line of goods were, that he replied, "Upstairs, Will is up there;" that he continued to walk towards the rear, and found Will Fisher about ten or twelve feet from, and east of, the elevator; that he asked Fisher where the ingrain were; that Fisher replied, "Upstairs, Bennett; we will take the elevator;" that Fisher walked towards the elevator, the plaintiff closely following; that the south door of the shaft was open; that Fisher entered the door and stepped to one side; that the plaintiff, supposing the elevator to be there, also stepped in, fell to the bottom of the shaft, a distance of ten or twelve feet, and was injured. The fact was that the elevator was above, and the rope by which the elevator was run being on the inside and about a foot from the door. Fisher rested his right foot on the timber inside the shaft, his left foot outside, leaned into the shaft, called out "Elevator," and reached for the rope. While Fisher was doing this, plaintiff stepped in and fell. A verdict was rendered for the defendant.

EDWIN PALMER and GEORGE GARTNER, for appellant.

DICKINSON, THURBER & STEVENSON, for appellee.

GRANT, J. (after stating the facts.)—The theory of the plaintiff is that he was invited into a place of danger without warning, and without proper guards at the entrance to protect him. This was not a passenger elevator, and unless plaintiff was invited into it he cannot recover. The jury, by their special verdict, have settled this question against the plaintiff, and they could not, under the evidence, consistently have found otherwise. Mr. Fisher, plaintiff's witness, who was not in defendant's employ at the time of the trial, flatly contradicted him, and testified, not only that he did not invite him, but that he did not know that plaintiff was following him. The elevator did not run between twelve and one o'clock. Fisher was in a hurry to go to the fifth floor to get some goods to fill an order before it stopped. Mr. Williams, the clerk whom plaintiff first addressed, and Mrs. Leahy, the customer upon whom Williams was waiting, also flatly contradicted plaintiff. These witnesses testified that, when plaintiff asked Williams where the ingrain were, Williams replied that he would soon be through, and would wait upon him. Without objection, the following special question was submitted to the jury, "Do you find the facts in relation to plaintiff's going to the place where he was injured to be as testified to by George Williams, Mrs. Leahy, and William Fisher?" to which the jury

answered, "Yes." The fact is therefore established that plaintiff attempted to enter the elevator without invitation or permission. He alone is responsible for the accident and the injury, and cannot recover. *Bedell v. Berkley*, 76 Mich. 440, 43 N. W. 308; *Pelton v. Schmidt*, 97 Mich. 231, 56 N. W. 689; *Severy v. Nickerson*, 120 Mass. 306; *Victory v. Baker*, 67 N. Y. 366; *Gibson v. Sziepienski*, 37 Ill. App. 601.

Many alleged errors are assigned, but they do not affect the evidence upon which the jury based their special finding. It is unnecessary, therefore, to discuss them. Judgment affirmed. The other justices concurred.

TOWN v. MISSOURI PACIFIC RAILWAY COMPANY.

Supreme Court, Nebraska, March, 1897.

WATER-COURSES.—To constitute a water-course the size of the stream is not material. It must, however, be a stream in fact, as distinguished from mere surface drainage occasioned by freshets or other extraordinary causes, but the flow of water need not be continuous (1).

SURFACE WATERS.—The doctrine of the common law in regard to surface waters is, as a general rule, in force and controls in this state. Surface waters may be controlled by the owner of the land on which they fall or originate, or over which they flow. He may appropriate to his own use all that falls or comes on his land, and refuse to receive any that falls or originates or flows on or over adjoining property (2).

CONTROL OF SURFACE WATERS BY OWNER OF LAND.—The right, under the general rule, to control surface waters, must be so exercised by any person as not to unnecessarily or negligently cause injury to the rights and property of others (3).

1. *Pyle v. Richards*, 17 Neb. 180, 22 N. W. 370. In *Hoyt v. City of Hudson*, 27 Wis. 656, it was said of a water-course: "There must be a stream usually flowing in a particular direction though it need not flow continually. It may sometimes be dry. It must flow in a definite channel having a bed, sides or banks, and usually discharge itself into some other stream or body of water. It must be something more than a mere surface drainage over the entire face of the tract of land, occasioned by unusual freshets or other extraordinary causes. It does not include the water flowing in hol-

lows or ravines in land, which is the mere surface water from rain or melting snow, and is discharged through them from a higher to a lower level, but which at other times are destitute of water."

2. *Railroad Co. v. Sutherland*, 44 Neb. 526; *Morrissey v. Railroad Co.*, 38 Neb. 406, 56 N. W. 946.

3. *Association v. Peterson*, 41 Neb. 897, 60 N. W. 373; *Railroad Co. v. Sutherland*, 44 Neb. 526, 62 N. W. 859; *Jacobson v. Van Boening*, 48 Neb. 80, 66 N. W. 993.

OBSTRUCTING FLOW OF SURFACE WATER THAT HAS FORMED CHANNEL.—Surface waters may have such an accustomed flow as to have formed at a certain place a channel or course cut in the soil by the action of the water, with well-defined banks, and having many of the distinctive attributes of a water course; and though there are no exceptions to the general rule, except from necessity, this may constitute an exception, and if the flow is stopped by the erection of an embankment across and in the channel, some provision may be necessary for the allowance of the regular flow of the surface waters.

EMBANKMENT OBSTRUCTING FLOW.—Whether such embankment has been negligently constructed with reference to the obstruction of the flow of the surface waters and whether such negligence, if any, is the proximate cause of an alleged injury, are generally questions to be submitted to the jury.

FROM a judgment of District Court, Lancaster County, in favor of defendant, the plaintiff brings error.

SAMUEL J. TUTTLE, for plaintiff in error.

A. R. TALBOT, for defendant in error.

This is an action by the plaintiff in error, also plaintiff in the lower court, to recover of the defendant railway company the damages alleged to have been caused by the obstruction of a water course by the careless and negligent construction and maintenance of an embankment by the railway company on its right of way and the consequent flooding of the plaintiff's premises or place of business, in the city of Lincoln, and injury to the articles which he kept on sale.

It appears that on and prior to the 10th of June, and during some considerable time subsequent thereto, the plaintiff was conducting mainly what is commonly known as a "feed store" in a building on the corner of 27th and W. streets, in the city of Lincoln, in which, on the said 10th of June, he had a stock or supply consisting of hay, corn, oats, etc. A body of land—the plaintiff says about a section (640 acres), one witness says a half section, and others fix it at 200 or 300 acres—within the corporate limits of the city of Lincoln, including some of the improved portions of the city, and all platted or laid out in lots and blocks, etc., on a lot of which was the plaintiff's place of business, has such a surface conformation or is sloped so that in time of rains or melting snows any running waters caused thereby flow towards and come together in a body at a place and in what some witnesses called a "draw," others a "depression in the prairie," and others a "channel" or "water way," having its course near the store of plaintiff, and in or directly across which an embankment was made by or for the railway company, and which stopped the flowage of waters in the channel. The company made a culvert by placing at the base of the embankment, in the course

which the surface waters had apparently taken in their flow, a tile of the required length, and of an internal diameter of twenty-four inches. On the date stated in plaintiff's petition there was a very heavy rainfall, and the consequent flow of the surface waters draining from the body of land or portion of the city we have hereinbefore indicated came in what plaintiff contends was their regular and natural channel or well-defined course, and, when they reached the embankment were, he asserts, by reason of the construction of such embankment, and the lack of a proper culvert or opening in the embankment for the waters to run in their natural and usual direction and pass through in sufficient volume or quantity, thrown back and into plaintiff's store.

A finding that there was no negligence shown which was the natural and proximate cause of the injury to plaintiff's property was amply supported by the evidence. We must conclude that the verdict of the jury was sustained by the evidence, and not contrary to the rules of law applicable to the facts.

The syllabus made by the court states the points decided.

Judgment affirmed.

Opinion by HARRISON,

CONSOLIDATED TRACTION COMPANY v. KNOTH.

Court of Errors and Appeals, New Jersey, March, 1897.

DRIVING ACROSS STREET RAILROAD TRACK—COLLISION.—Where there was conflicting evidence as to whether the plaintiff looked back and saw a car approaching at a distance of from 200 or 400 feet before he attempted to drive across the track, or that he drove across in front of a car only thirty-five feet away, and without looking, the question was properly left to the jury.

FROM a judgment of Circuit Court, Essex County, in favor of plaintiff, defendant brings error.

The plaintiff, while driving a beer wagon on the afternoon of April 26th, 1895, down Springfield avenue in Newark, attempted to cross the defendant's tracks from the north to the south side of the avenue, and when his wagon was nearly over the south track, it was struck by a trolley car and he was thrown out and sustained severe injury. The plaintiff's evidence tended to show that just before he crossed the tracks he looked back, and saw the car following him at

a distance of from 200 to 400 feet, and, deeming that he had plenty of time to cross, he attempted to do so and would have gotten safely over but for the great and unexpected speed with which the car followed him. From the evidence for the defendant, it appeared that the plaintiff, without first looking back before crossing the track, suddenly attempted to cross when the car was only thirty-five or forty feet away, and could not be stopped in time to avoid the collision.

JOSEPH COULT, for plaintiff in error.

SAMUEL KALISCH, for defendant in error.

PER CURIAM. It is clear that the case was one for decision by the jury. No question is raised as to the correctness of the exposition of the law by the judge in his submission of the case to that body. Let the judgment be affirmed.

BROWN v. THIRD AVENUE RAILROAD COMPANY.

*Supreme Court, New York, Appellate Term, First Department,
February, 1897.*

EVIDENCE.—An objection to the question put to a physician, "In your opinion, is she likely to recover," as being incompetent, immaterial and irrelevant is too general to be available on appeal. *Wallace v. Vacuum Oil Co.*, 128 N. Y. 579-581.

EXPERT EVIDENCE.—After "malingering" had been defined by the medical expert as "a deception practiced by anybody, from which they try to make out that they are sick when they are not sick," the question, "Would you say that Mrs. Brown (the plaintiff) were a malingerer? or what qualification would you put upon it?" was properly excluded as requiring an answer not whether the subjective symptoms were feigned but to characterize the plaintiff by a particular term implying wilful deception or even perjury.

DAMAGES—WIFE'S EARNINGS.—In an action by a husband for injuries to his wife where there was no evidence that her earnings were kept apart by her as a separate estate and that she and her husband were living and kept together, the presumption is that her earnings were turned in as a part of the family resources, and a refusal to charge that the husband had no absolute legal right to the earnings of his wife was proper.

APPEAL from judgment of the General Term of the City Court of New York affirming judgment entered on a verdict in favor of plaintiff for \$900.

HOADLEY, LAUTERBACH & JOHNSON (JOHN V. BOUVIER, JR., of counsel), for appellant.

W. B. DONIHÉE, for respondent.

The wife of the plaintiff, while a passenger upon defendant's car, was injured by a collision between it and another car of the same line, and he sues in this action to recover for the loss of her services. The jury gave a verdict of \$900, and the defendant appealed to the General Term of the City Court, where the judgment and an order denying the motion for a new trial were affirmed. An appeal is taken to this court, and a reversal asked for alleged errors in the rulings of the trial judge upon questions of evidence, and requests for instructions to the jury.

The points decided by the court are stated in the syllabus.

Judgment affirmed.

Opinion by DALY, P. J.

MITCHELL v. WEIR.

*Supreme Court, New York, Appellate Term, First Department,
February, 1897.*

COMMON CARRIER — FAILURE TO DELIVER BICYCLE.—An express company that accepted a bicycle for shipment and failed to deliver the same to the plaintiff, who had purchased and shipped it for use during her vacation, was liable for the value of the bicycle, though the company offered to deliver it at the end of the plaintiff's vacation.

APPEAL from judgment of justice of the Seventh District Court in the city of New York, in favor of plaintiff, in action by her against Levi C. Weir, as president of Adams Express Company.

CARL A. DE GERSDORF, H. SNOWDEN MARSHALL, and SEWARD, GUTHRIE & STEELE, for appellant.

H. B. BRADBURY, for respondent.

The plaintiff, a professional nurse, purchased a bicycle for \$50, and delivered it to defendant's express company in Brooklyn to be shipped to Sussex, New Brunswick, Canada, at the same time signing and delivering to the company, at its request, duplicate papers, to enable the company to get the machine through the Canadian custom-house. This was on June 7, 1896. The bicycle was never delivered in Sussex, the company having mislaid the duplicate paper sent with the machine. Upon the plaintiff's arrival in Sussex, a week after the shipment, she made inquiries of the express company's agent there, who caused investigation to be instituted for the machine, and reported that it could not be found. It was subsequently traced to the defendant's office in Boston, and an offer was

made on August 7th to forward it to plaintiff, if she would fill out a declaration inclosed to her, and send it to defendant at the latter city. No attention was paid to this request, a claim for the value of the bicycle having been made on her behalf on the previous 29th of July. The plaintiff intended the bicycle for her personal use during her vacation in Sussex, which came to an end about the time that the offer was made to send the machine to her. It appeared from her testimony that the bicycle was of no use to her after leaving Sussex, her business being such that she could not use it, and that she was unable to hire a bicycle for use in Sussex, or within forty miles of that place. Upon the evidence the justice gave judgment for the value of the bicycle. This was the proper measure of damages for the non-delivery of an article intrusted, as this was, to a common carrier. The general rule, where goods are intrusted to a carrier, and are not delivered according to his undertaking, is that the value of the goods is the measure of the damages. Ang. Carr. § 482, and cases cited; *Harvey v. Railroad Co.*, 124 Mass. 421; *Spring v. Haskell*, 4 Allen, 112. In an action against a common carrier for failure to transport and deliver goods in accordance with his contract, the measure of damages is the value of the goods at the place of destination, at the time they should have been delivered pursuant to the contract, and in the condition the carrier undertook to deliver them, less the price to be paid for his service. *Sturgess v. Bissell*, 46 N. Y. 462. The appellant claims that the facts showed only a delay in delivery, and that that was the cause of action, as stated by the complaint, and invokes the rule that for non-delivery of the goods within a reasonable time the carrier is only responsible for the consequences of his breach of contract. Ang. Carr. § 490. It is true that delay is not a conversion of the goods, and that the carrier is only responsible for the damages sustained by his delay. *Hutch. Carr.* § 775. In this case there was an absolute failure of the delivery of the goods at the place of destination, with notice of that fact to defendant, and consequently it is not in a position to claim that this was a case of mere delay. To hold otherwise would be to strain the law unduly in favor of the common carrier in a case where the inconvenience inflicted by its negligence cannot be compensated for by the mild rule of damages to which it is willing to submit.

The claim of the express company, that it was unable to make delivery because plaintiff refused to furnish the declaration requested, is unavailing. The bicycle, if delivered at that time, would have been no longer of any use to the plaintiff, who was about to return to this city, her summer vacation being about to expire. She was

under no obligation to assist the defendant to make a delivery at that time which would have the effect of relieving them from the just penalty incurred by their own breach of duty.

Judgment affirmed.

Opinion by DALY, P. J.

FELICE v. NEW YORK CENTRAL AND HUDSON RIVER RAILROAD COMPANY.

*Supreme Court, New York, Appellate Division, First Department,
February, 1897.*

LABORER WHILE AT WORK IN TUNNEL, KILLED BY ENGINE.—

Where laborers were at work, in a railroad tunnel, dimly lighted by small torches, and after a train had passed on one track and the tunnel was filled with smoke and steam, rendering objects almost indistinguishable and the tunnel was filled with the noise of the train, a light engine came down, backwards, on the other track, at the rate of fifteen miles an hour, with no light, except a small hand lantern that was hung from the top of the cab, and giving warning by ringing the bell, and one of the laborers was struck and killed by the engine, which was not discovered until it was almost upon him, there was sufficient evidence to justify the jury in finding that sufficient warning was not given of the approach of the engine, and the company was liable.

DAMAGES.—A verdict for \$5,000, for the death of a laborer, thirty-three years of age, earning \$1.25 a day, and the sole support of his family, consisting of a wife and three children, was not excessive.

APPEAL from judgment, Supreme Court, New York County, in favor of plaintiffs.

HERBERT E. KINNEY, for appellant.

H. M. HEYMANN, for respondents.

On the 20th day of September, 1895, Vincenzo Felice, the plaintiff's intestate, was a laborer in the employ of the defendant, and as such was at work on what is known as the "Weehawken Tunnel," through which ran the West Shore Railroad,—a road under the control of the defendant. Felice, with other men, under the charge of a foreman, was engaged in digging a ditch along the tracks through the tunnel. The place where they were at work was a long way from the entrance, so that no daylight could penetrate. The only means for artificial lighting of the tunnel were the few torches with which the men were furnished to throw light upon the ditches where they were at work. While they were digging, a train came from the south, of which they had notice, and they left their work for the

purpose of getting out of the way of the cars. As that train was passing, a light engine, running backwards, came from the north. This engine, as it would seem, was not perceived until it was almost upon the men; and Felice, not being able to get out of the way, was struck by it and killed. In this action, brought by his administrators for damages, a verdict was recovered, on which judgment was entered. From that judgment, and from an order denying the motion for a new trial, this appeal is taken.

In the absence of rules (which in this case, it is settled, were not necessary), the defendant was called upon to use such other means of giving warning as were proper and sufficient for the purpose. The jury cannot say what means of warning should be adopted. The question for them is simply whether the means which were adopted to give warning in the particular case were sufficient for the purpose for which they were intended. *Dyer v. Railway Co.*, 71 N. Y. 228. In this case the evidence shows that it was not the duty of any one man of those in the tunnel to look out for the safety of the rest. Each man was required to look out for himself. That being so, it was clearly the duty of the defendant to give such warning of the approach of trains as would permit each man, looking out for himself, to become aware of their approach in time to avoid them. It seems that at this time a train had just passed, going north. While the smoke and steam from the engine of that train had filled the tunnel so that it was almost impossible to distinguish objects through the dim light which was given by the torches furnished to the men, and the tunnel was filled with the noise and rattle of the train, a light engine came down upon the other track, running backwards, with no light upon the rear of the tender, and giving as a warning only the ringing of the bell. This engine was running at the rate of about fifteen miles an hour. The only light which could be seen from it was a small hand lantern, with one wick, hanging from the top of the cab, twelve or fifteen feet forward of the rear of the engine. Just how much notice of the approach of this engine was given by that light, in the smoke and steam of the other train, can easily be imagined. There is no pretense that any other warning than that light and the bell was given of the approach of this engine; and the jury were justified, from the evidence, in finding as a fact that the plaintiff's intestate, and the men immediately about him, were not aware of it until it was directly upon them. In view of that fact, they were also justified in finding that sufficient warning was not given of the approach of that engine to enable the plaintiff's intestate to get out of its way. The question of fact was sufficiently presented to the jury. We think the question of contributory

negligence was properly left to the jury. It is quite true that the plaintiff's intestate knew that the defendant was in the habit of permitting its trains and engines to run down through this tunnel at comparatively high speed, and that he was bound to look out for them and avoid them. But he was supposed to know that there was imposed upon the master the duty to use all reasonable care to diminish the dangers which might arise from the running of trains through this tunnel, and he was bound only to exercise such care as would be sufficient to protect him if the defendant, on its part, had given him the warning to which he was entitled. *McGovern v. Railroad Co.*, 123 N. Y. 280; *Ford v. Railroad Co.*, 124 N. Y. 493.

So far as the acts of Felice himself are concerned, there is nothing in the case which shows that he omitted any act which a reasonable man would take to avoid the dangers which surrounded him. When he received notice of the coming of the first train, he stopped his work and at once sought a place of safety in common with all the other men in the gang. It is a fair inference from the evidence that, when he first knew of the approach of the light engine upon the other track, he made some sort of an effort in common with his comrades to avoid it. All but he succeeded. It cannot be said that Felice assumed the risk of the danger arising from the approach of the engine which struck him. A servant assumes such risks only as he knows are incidental to his employment. There is nothing in this case to show that it was the habit of the company to run its trains through the tunnel without proper warning, and thus Felice did not assume any risk from the want of proper notice of the approach of trains. *Paolo v. Hunter*, 3 App. Div. 528.

It is claimed by the defendant that the damages were excessive, and that the verdict should be set aside on that ground. This accident took place in the State of New Jersey on the 20th of September, 1895. It seems from the statute, which is printed in the record, that the law of the State of New Jersey is substantially like that of the State of New York, and, at the time that this accident occurred there was in neither place any limit in the statute to the amount of damages which the jury might render where death was the result of the negligence. It was admitted in this case that the intestate was thirty-three years old; that he had a wife and three children; that he was in good health and of temperate habits, and the sole support of his family; that he received \$1.25 per day wages. Nothing else is shown, so far as we can learn, bearing upon the question of damages. That question is one exclusively for the jury. While in these cases nothing can be given for the loss of society, and for mere "sentimental damages," as they may be called, yet the benefit of

the counsel of the husband and father is worth something pecuniarily, even though he may be a day laborer; and it cannot be said, as a matter of law, that \$5,000 is too much to compensate the family for the loss of the head of it, even if it should be supposed that, being a day laborer, he would always continue in that particular employment, and never get beyond it. As far as we can observe, the legal proposition upon which the defendant stands is that a day laborer, who is a foreigner, cannot, in any event, be worth more than \$5,000 to his wife and children. To that proposition we do not accede.

Judgment affirmed.

Opinion by RUMSEY, J.

WIHNYK v. SECOND AVENUE RAILROAD COMPANY.

*Supreme Court, New York, Appellate Division, Second Department,
February, 1897.*

CHILD RUN OVER BY HORSE CAR.—Where it appeared that a child, nine years of age, in the company of and in advance of her mother, was struck down and run over by a horse car while she was attempting to cross the street on the crosswalk; and there was conflicting evidence as to whether the driver struck the horses and increased the speed of the car just before the accident or that he applied the brake, the question of negligence was properly left to the jury and a verdict for the plaintiff would not be disturbed.

APPEAL from judgment, Supreme Court, New York County, in favor of plaintiff, entered on verdict of jury for \$8,500. Transferred to Second Department.

PAYSON MERRILL, for the appellant.

FREDERIC E. PERHAM and DAVID LEVENTRITT, for the respondent.

This action is to recover damages for personal injuries. The plaintiff is an infant, and at the time of the accident was nine years and two months old. At the time of the occurrence in question, a Sunday afternoon in June, 1893, the plaintiff, in company with her mother, two brothers and two sisters, was proceeding easterly on the south side of Seventy-second street, in the city of New York. Of these five children, the oldest was a boy, then not quite eleven years; the youngest, a babe in the mother's arms. They were accompanied by Mrs. Nader, who had with her her two children, one of them also a child in arms. When the party reached First avenue the plaintiff and her youngest brother were in front. The

near or down-track, on First avenue, was clear, but on the further, or uptown track, a car was approaching from the south. From this point there is a sharp conflict between the parties as to what occurred. On the part of the plaintiff her mother testified that the car was distant some forty feet or more when the plaintiff reached the first track; that the driver did not notice the child, or apply the brake, but struck his horse with his reins, causing them to go faster; that the plaintiff, as she crossed the track, was struck by the horses and knocked down. The child was taken from under the car just in front of the forward wheel. In this statement the mother was substantially corroborated by the testimony of Mrs. Nader and by that of her eldest son. For the defendant it was asserted that the driver saw the child, and applied the brake; and, on the dominant question as to how the child came to be struck, the testimony of seven witnesses produced by the defendant was to the effect that the plaintiff had crossed safely in front of the horses, and was injured on her return to her mother. Two of these witnesses say that the accident occurred as the plaintiff was proceeding westward; that she tripped on the rail and fell; while the other five state that plaintiff reached her mother safely, and then broke away from her, and was going east for the second time, when she was struck by the horses. The counsel for the appellant insists that neither the plaintiff's freedom from negligence nor the negligence of the driver was established, and that the motion to dismiss the complaint should have been granted. We think that both questions were properly for the jury. The accident occurred practically at the crosswalk. At such places the drivers of vehicles must anticipate the probable presence of pedestrians and be on their guard to avoid injuring them (*Murphy v. Orr*, 96 N. Y. 14), and in this the present case differs from that of *Fenton v. Railroad Co.*, 126 N. Y. 625, 26 N. E. 967. The carriageway of the avenue was quite broad, and, had the driver been careful, he would have seen two women, with seven small children, two of them in arms, seeking to cross the street. Such a sight should necessarily have imposed upon him the duty of active vigilance when he sought to drive over the crossing. He should have had his team and car well under control. If he had such control, and proceeded towards the crossing carefully, and the child had suddenly appeared in front of his horses, without any reason on his part to expect her presence, doubtless he would have been guilty of no negligence. But the plaintiff's evidence went to prove a contrary state of facts. It tended to establish that the driver, instead of keeping his team under control, increased the speed of his horses; that he did not apply the brake; and that at a distance of fifty feet

or more he should have seen the plaintiff, with the other children, crossing the track. If these were the facts, and the horses struck the child while she was crossing on the crosswalk in the same direction in which she had been previously moving, it was negligence on the part of the driver to have run her down, or at least the jury might have so found. Assuming these facts, we do not see how the present case can be distinguished from that of *Stone v. Railroad Co.*, 115 N. Y. 104, 21 N. E. 712. The case cited is, we think, also a controlling authority for the propriety of submitting to the jury the question of the contributory negligence of the plaintiff, and also the question whether she was *non sui juris*. In fact the two questions of the contributory negligence of the plaintiff and the negligence of the driver are so interwoven in this case as to be difficult of separation. While the negligence of the parties was doubtless properly left to the jury, as well as the question of the facts from which such negligence could be inferred, it is apparent that, if the story of the plaintiff's witnesses is true, she was free from fault, and the driver was to blame; while, if the witnesses for the defense testify correctly, the plaintiff, if *sui juris*, was negligent, and whether she was *sui juris* or not, the defendant was wholly blameless.

It was claimed on the part of the plaintiff that as a result of the injury which she received, she became practically an idiot. If the claim on plaintiff's part was substantiated, the amount awarded her cannot be said to be excessive.

Judgment affirmed.

Opinion by CULLEN, J.

BITTNER, ADM'R, V. THE CROSSTOWN STREET RAILWAY COMPANY OF BUFFALO.

Court of Appeals New York, May, 1897.

EMERGENCY—MOTORMAN BACKING CAR OVER BOY WHO HAD BEEN RUN OVER.—Where a boy, while attempting to cross the street in front of a trolley car, was struck and run over by the car, and there was evidence that the boy was alive after the car passed over him, and that the motorman, in his excitement, reversed the car, which again passed over the boy, and then again went forward and over him, the jury should have been instructed that an error in the exercise of judgment by the motorman would not make the defendant liable for the results in the management of the car in the emergency which occurred after the deceased was struck down, and for a failure to do so a judgment for plaintiff was reversed.

THIS is an appeal from a judgment of the General Term of the Superior Court of Buffalo, which affirmed a judgment entered upon a verdict in favor of plaintiff. Plaintiff, as administrator, brought this action to recover damages for the death of his infant son, alleged to have been caused by the negligence of the defendant, that was operating an electric street railway in the city of Buffalo on the 17th of October, 1892. The accident occurred in the middle of the day. The boy was between eight and nine years of age at the time, and was shown to have been bright and intelligent. He was running from the south side to the north side of the street, and there being between the car tracks and the sidewalk a manure wagon drawn by a pair of horses, he ran in front of it, and coming upon the south track within four or five feet of one of the defendant's cars, then proceeding eastwardly, was struck by it. The car passed over him, and then, upon the reverse action being given by the motorman, in his effort to stop the car, it passed backward over his body. A witness named Toms testified that the car at first ran over the boy's legs and then, after proceeding two or three car lengths, it stopped, backed over him and then again went forward and over him. He further testified that he saw the boy try to raise himself after the car had first passed over him, and that, before he succeeded in doing so, he was again struck down and crushed by the backing of the car. That the car was going at the rate of twelve or fifteen miles an hour, and that the boy's face, when running across the street, was turned away from the car. The testimony of this witness was the evidence relied upon at the trial to sustain the plaintiff's cause of action. A number of witnesses gave evidence in flat contradiction. A police captain testified that Toms told him a few minutes after the occurrence that he did not see the car run over the boy.

A police officer, who saw the accident from a point about one hundred feet away, testified that Toms came up only after the accident, and that the boy did not move after the car first passed over him. He also said that the car did not go beyond about half its length over the boy before its action was reversed, and that it did not pass over him the third time. Another police officer, who saw the accident close by, corroborated the testimony of the other officer, with respect to how the car passed over the boy and how it was reversed and as to the boy's not moving. Three other witnesses, who saw the occurrence from different neighboring points, also agreed that the car only passed over the boy a few feet before it reversed, and that the boy did not move after he was first struck down. The motorman testified that the car was going at the usual

rate of speed; that there was a manure wagon alongside the car between it and the sidewalk; that the boy ran around the heads of the horses about four feet ahead of the car, and was almost immediately struck by it in the center of the track; that as soon as he saw the boy he reversed the action of the car so as not to hit him, and that the effect was to throw him against the dashboard, and upon the reverse motion being set up, he was thrown against the body of the car; that he was not aware of going back over the boy; that he did not see Toms, with whom he was acquainted. A verdict was rendered for the plaintiff, and the judgment entered was affirmed by the General Term, the two judges holding it dividing in opinion, which had the effect of affirming the judgment.

PORTER NORTON, for appellant.

EMORY P. CLOSE, for respondent.

GRAY, J.—If it were not for the testimony which was given by witness Toms upon the trial, it would not be possible to say that there was any evidence upon which negligence could be predicated of the defendant. The history of the occurrence shows that the deceased heedlessly ran in front of the car and in such close proximity to it as to render its striking him a certain occurrence. There is no conflict in the testimony with respect to the principal facts. The boy started to cross the street in the middle of the block, when a vehicle was proceeding between him and the car tracks, which, from its peculiar construction, precluded a view beyond it. Running upon an angle across the street, he passed around the horses' heads, without looking for, or apparently seeing, the approaching car upon the other side of the wagon. He was familiar with the locality, and the evidence warranted the inference that he was quite capable of taking care of himself, at least, to the extent demanded by the occasion. He was on his way from his sister's residence to his grandfather's, upon the other side of the street, as he had been in the habit of doing. Except for the testimony of Toms, that the car was proceeding at a rate of from twelve to fifteen miles an hour; that after it had passed over the boy's body it went as much as two or three times its length before it was stopped, and that then the boy was still living and was endeavoring to raise himself up from the ground when the car backed down over him, and then was impelled forward and again over him the third time, there would be no ground whatever for saying that any question was left open for the jury to pass upon with respect to the conduct of the motorman. Toms' evidence was so shaken as to its credibility by the other testimony in the case, that it became of the highest importance that the jury should be so carefully instructed by the trial judge upon the

law applicable to the facts as that there should be no room for a belief that they might have been misled. There was no negligence in the mere fact of the car running at a high rate of speed. No law regulated that, and it was for the jury to say, in view of the surrounding conditions at the time, whether such a rate of speed, if they believed Toms' testimony about it, was excessive, and therefore dangerous under the circumstances. While we think the evidence to show negligence in the motorman was of the very slightest character, and barely to be relied upon, in view of the other testimony and of the probabilities of the situation, we will concede that it may have been sufficient to raise a question for the jury, and we will proceed to consider the question in the case upon which the judges differed at the General Term. That question arose upon a request made by the defendant that the jury should be instructed, "that the defendant is not responsible for the error in judgment, if there was any, on the part of the motorman in the management of the car after it struck the boy." The trial judge ruled upon this request as follows: "I have already charged you upon this proposition." Referring to the portion of his charge to which he must have referred, it reads as follows: "I may say, if the defendant was entirely free from fault in the first instance, or if the boy was guilty of negligence in running upon the track in the way he did, and the car had passed over him, a number of feet beyond him, and the boy was injured in the legs, as it is claimed by one of the plaintiff's witnesses, and was attempting to get up from the track, and the motorman was careless in the management of his car by running back upon him, and then killing him, the question of whether or not the boy was guilty of negligence in the first instance would be of no importance in that condition of things, and the plaintiff could recover, notwithstanding the boy was negligent in first going on the track." The defendant was entitled to have the jury clearly instructed that an error in the exercise of judgment by the motorman would not make the defendant liable for the results in the management of the car, in the emergency which occurred after the deceased was struck down and the charge did not cover that point; or, at least, not in such exact language as, in our judgment, to make it perfectly clear to the juror's minds. To instruct them that, if the motorman was careless in so managing his car as to run back upon the boy, the plaintiff might recover, was not the clear equivalent of an instruction that if the motorman erred in judgment in what he did after the car struck the boy, the defendant would not be responsible for that error of judgment. The evidence in the case would have warranted the jury in finding that the deceased was guilty of contributory negligence, in placing

himself directly in front of the passing car, and that the motorman was not guilty of any negligence in striking him. If they should have reached that conclusion and were brought face to face with the subsequent situation, after the boy had been knocked down and run over, they could only return a verdict for the plaintiff upon the basis of some act of negligence then occurring on the part of the defendant's servant, the motorman, by which the accident was aggravated. If they could believe the evidence of the witness Toms, that the car had passed so far beyond the boy, and then, while he was still alive, was backed down upon him and again was sent over him, they could, perhaps, say that the motorman was careless in the management of his car at the time, and that, through such carelessness, the boy was, in fact, killed. But, if they believed that the motorman was endeavoring, in the exercise of his judgment, to prevent injury to the boy, then there was no carelessness on his part, but merely an error of judgment, for which the defendant could not be held responsible. Upon the evidence it appears that the motorman was confronted with a sudden emergency, and it should have been distinctly stated to the jury that if, in what he did, he used his judgment, the defendant was not responsible, even if it was an error which brought about the lamentable results claimed. Even the failure to exercise the best judgment would not be evidence of negligence. *Wynn v. C. P. etc. R. R. Co.*, 133 N. Y. 575. Judge Hatch, in his opinion at the General Term, has very fully reasoned out the proposition, and it is not necessary for us to say more than we have said.

For the reasons given the judgment should be reversed and a new trial ordered, with costs to abide the event.

All concur.

Judgment reversed.

GEORGE V. CYPRESS HILLS CEMETERY.

Supreme Court, New York, Trial Term, Kings County, May, 1897.

CEMETERY—LOT OWNER POISONED BY SHRUB.—Where the owner of a cemetery lot, while moving about the lot, came into contact with a shrub commonly known as "poison ivy" which the cemetery negligently allowed to grow there, and was poisoned, the cemetery was liable.

THIS was an action for damages for injuries sustained by the plaintiff, Barbara George, by being poisoned by "poison ivy" while

visiting her lot in Cypress Hills Cemetery. The complaint, after alleging the incorporation of the defendant, states: "That the plaintiff is the owner of a certain grave, plot or lot known as number 6857 in the portion of said cemetery known as Locust Grove, and the said lot being under the charge, care, and control of said defendant. That on or about the 30th day of June, 1895, said plaintiff, while lawfully visiting said grave or plot in said cemetery, and without any fault or negligence on her part, was poisoned by a certain shrub or plant commonly known as "poison ivy," which the defendant had carelessly and negligently allowed to grow about said grave or plot, and in consequence of such poisoning, the plaintiff became sick, sore and disordered, and suffered severe bodily pain and anguish, and still suffers great pain and anguish, and will continue so to do; and was prevented from attending to her business and was compelled to procure medical attendance and medicine, all to her damage ten thousand dollars." The answer practically was a general denial of the alleged negligence. After the plaintiff proved that the shrub grew on the outside of the plot as well as the inside, the court allowed the case to go to the jury, who rendered a verdict for \$3,500.

JOHN A. ANDERSON, appeared for plaintiff.

C. L. LYON, for defendant.

CLEARY, ADM'R, V. BLAKE.

*Supreme Court, New York, Appellate Division, Second Department,
March, 1897.*

SCHOOLBOY KILLED BY FALLING THROUGH DOOR INTO CELLAR.

—Where a schoolboy, while returning after recess to his class-room, through an alleyway, used by the school children in large numbers, was killed by being precipitated into a cellar, as he leaned against an iron door, which had failed to catch after being slammed to by defendant's workmen, who were at work in the cellar, the defendants were not liable in the absence of evidence that the workmen were aware of the movements of the school children, and that such an accident was liable to happen if the door was not secured.

APPEAL from judgment, Supreme Court, Kings County, in favor of plaintiff.

PERCY D. TRAFFORD, for appellants.

WILLIAM J. GRIFFIN, for respondent.

The plaintiff's son, a schoolboy, between six and seven years of age, was killed on the 14th day of October, 1895, by falling through

a door which opened into a cellar at Public School No. 107 in the city of Brooklyn, out of an alleyway leading from the street into the school yard. This alleyway was used by the school children in large numbers, on their way into the school and out. The deceased lad, Christopher H. Cleary, with a crowd of his fellow-pupils, was returning to his class-room after the recess for dinner, on the day of the accident, when he went over to an iron grating which was in front of the cellar door already mentioned, and in some manner leaned or placed his back against it, so that the door opened, and he fell into the cellar, receiving injuries which resulted in his death a few hours later. At this time the firm of Blake & Williams, composed of the defendants, were engaged as steam fitters in fulfilling a contract with the board of education to do certain work upon Public School No. 107. In the course of the work, their employees had occasion to use the cellar, and, on the morning of the day when the accident occurred, they had opened the door through which the boy afterwards fell, for the purpose of removing a pulley. The door then had been apparently closed, but not so securely as to prevent it from being pressed open as it was when the lad fell through. Neither of the defendants was present, but they have been held liable for the death of the plaintiff's son on the ground that their workmen, in the course of their employment at the school, were guilty of negligence in omitting properly to close and secure the door, under the circumstances.

One of these workmen, Thomas Foley, who was called as a witness by the plaintiff, gave the only definite and specific testimony as to the manner of closing the door when it was last closed before the accident. He said that he latched and bolted one-half, and that the foreman then called him for something and as he turned off to do it he slammed the door and heard the latch click, and went away and never paid any more attention to it.

The foreman to whom the witness referred testified that he told Foley to close the door, but did not think he told him to lock it. The foreman also stated that he then saw Foley go over to the doorway, and close half of it, but he did not see what he did with the other half. Foley himself swore that the foreman had never told him to lock the door, and that there was no key in the door when he closed it.

If these witnesses, or either of them, had had any reason to expect that the door in question was likely to prove a trap for school children unless securely fastened, it might well be held that the foregoing evidence was sufficient to charge them and, therefore, their employers, with negligence. I am unable, however, to find anything in this

record to show that they were aware of the danger to which the unsecured door might expose the children using the alley or passage on their way to and from school. It does not appear that any of the defendants' workmen had ever seen the alley crowded with children, as it seems to have been on the occasion of the accident, or that they had any knowledge or information that the passageway was liable to be so used as to lead to pressure against the door from without by the passing pupils.

"No one is guilty of negligence by reason of failing to take precautions which no other man would be likely to take under the same circumstances." *Shearm. & Redf. Neg.* (4th ed.) sec. 11. This seems to me an excellent statement of the rule applicable here. Without other notice or knowledge of the danger than that disclosed by the proof in the case at bar, no one situated as the defendants' workmen were would be likely to take any greater precautions than they did in reference to the closing of the cellar door. While those precautions might have been deemed insufficient if the men had been aware or warned of the possible consequences of not fastening the door securely, they were apparently all that prudence demanded under the circumstances. See *Spengeman v. Alter*, 7 Misc. Rep. 61.

Judgment reversed

Opinion by BARTLETT, J.

MCGEARTY v. MANHATTAN RAILWAY COMPANY.

*Supreme Court, New York, Appellate Division, Second Department,
March, 1897.*

RAILROADS—OVERCROWDING STATION PLATFORM.—An elevated railroad company that continued to sell tickets and admitted passengers to its station platform until it became so full that one of the passengers, who had arrived before it was crowded, was pushed from the front edge of the platform and injured, is liable for the injuries.

EVIDENCE—GUARD-RAIL.—Evidence that there was no guard-rail at the edge of the platform similar to those placed at other stations was properly admitted as bearing upon the question of defendant's negligence in overcrowding the platform.

APPEAL from judgment, Supreme Court, New York County, in favor of plaintiff. Transferred from First Department.

JOSEPH H. ADAMS and JULIEN T. DAVIES, for appellant.

EDGAR J. NATHAN and FRANCIS L. WELLMAN, for respondent.

PER CURIAM.—The action is to recover damages for personal

injuries sustained by the plaintiff, occasioned by his being crowded from the platform by the passengers assembled at the defendant's elevated station at Grand street, in the city of New York, which caused the plaintiff to fall into the street below. The evidence given upon the trial was conflicting, the defendant's testimony tending to establish that the plaintiff fell from the platform while trying to board the rear car of a moving train. But upon this point the evidence warranted the jury in finding that the cause of the plaintiff's falling from the platform was on account of the overcrowding of the platform with passengers waiting to take the train for transportation over the defendant's railroad, and also to find that this condition was created by the negligence of the defendant.

It may be conceded that defendant's elevated station at Grand street is properly constructed, and is sufficient in extent to answer all of the ordinary requirements for which it is used, and accommodate the passengers who assemble there for the purpose of boarding the defendant's trains. But the theory upon which the case was tried and submitted to the jury, and upon which the negligence of the defendant was predicated, did not necessarily involve this question. The negligence of the defendant was based, not upon any infirmity in the structure as a structure, but upon the character of its use at the particular time. It was sufficient to accommodate ordinary traffic, for, so fast as the platform filled with passengers, they were removed by the trains of the defendant, which stopped at the station for that purpose at frequent intervals. It is easy to see that, as there was a constant accumulation of passengers upon the platform, unless they were moved by the trains, the platform of the station would become overcrowded, and that such overcrowding might render the place unsafe. That was shown to be the condition in this case. The trains did not remove the passengers as fast as they accumulated, and the defendant continued to sell tickets and admit passengers to the platform. When the plaintiff entered upon the platform, it was a safe place, and he had the right to assume that no part of it would be rendered unsafe by any act of the defendant. The obligation imposed upon the defendant was to take reasonable care in securing the safety of the passenger while upon its premises, and to see that he was exposed to no unnecessary danger while there. The defendant must be assumed to have known the capacity of its platform, and when it had admitted passengers to the extent of such capacity. If, when having done this, the passengers were not removed by its trains, it became its duty to permit no more to enter. It had no more right to accumulate a crowd at the rear, which, pressing forward, would precipitate those at the edge of

the platform into the street, than it would have the right to go upon the platform, and push them off by physical force. The jury were authorized to find that the defendant overcrowded the platform upon this occasion, and that such overcrowding was the cause of plaintiff's fall into the street.

Upon the trial, evidence was received to show that there was no guard-rail at the edge of the platform, similar to those placed at other stations upon the defendant's road. It is true that this evidence bore upon the character of the construction, and whether sufficient or not, but it also bore directly upon the question of defendant's negligence in overcrowding the platform. If there was no guard, then it is easy to see that persons at the extreme edge might be crowded off, when, if the rail was there, they could not be. The absence of a rail, therefore, had direct relation to the number of persons which might be safely admitted to the platform before removal. The question of the plaintiff's negligence was also a question for the jury upon the evidence.

Judgment and order unanimously affirmed.

HOELLERER v. KAPLAN.

*Supreme Court, New York, Appellate Term, First Department,
February, 1897.*

ADMISSION OF OWNERSHIP OF COACH—COLLISION.—A statement made by the owner of a coach, to whom a bill for damages, caused by a collision, was presented, that he would give the bill to his driver to pay, was an admission, sufficient to sustain an inference, that the driver, who did the damage, was in defendant's employ and that the accident had been reported to him.

APPEAL from judgment of Fourth District Court in favor of plaintiff.

MAX D. STEUER, for appellant.

LEOPOLD W. HARBURGER, for respondent.

DALY, P. J.—The evidence in this case is extremely meagre, and the liability of the defendant for the damage sued for is found solely because of his admissions. While an admission is the weakest kind of evidence, it is, nevertheless, sufficient to charge the party making it. The claim in this case is made by a livery stable keeper for damages to a hearse, the glass door of which was broken by the pole of a coach alleged to belong to defendant, and to be in charge of one of his drivers. The driver gave defendant's address as that

of his employer, and when the latter was called upon by the plaintiff's manager with a bill for the damage, he said he would give it to his driver to pay. This was denied by the defendant, but the justice, who had the witnesses before him, decided the conflict in favor of plaintiff. The admission was sufficient to sustain an inference that the driver who did the damage was in defendant's employ, and that the accident had been reported to him. The judgment in favor of the plaintiff therefore cannot be disturbed. It appears, however, that while the damages proved were only \$3.50, a judgment for \$8 was rendered. It must be modified and reduced to the former amount, and, as so modified, will be affirmed, without costs to either party.

All concur.

GULLIVER v. BLAUVELT

*Supreme Court, New York, Appellate Division, Second Department,
February, 1897.*

COW TETHERED IN HIGHWAY—HORSE STUMBLING OVER CHAIN.—

Where a cow was tethered in the highway, it will be presumed that she was placed there by her owner; and where a rider's horse was injured by stumbling on a chain that stretched across the road and was pulled taut by the cow just as the horse reached it, such owner will be liable for the injuries.

APPEAL from judgment, Supreme Court, New York County, in favor of plaintiff. Transferred from First Department.

J. H. K. BLAUVELT, for appellant.

CHARLES W. PIERSON, for respondent.

This action is brought to recover damages for injuries to a saddle horse, the property of the plaintiff. The occurrence took place in the State of New Jersey. The plaintiff's claim was that he was riding along the highway; that the defendant's cow was tethered on the side of the highway by a chain fastened to an iron stake; that the cow was standing on the other side of the traveled road from that where the stake was driven in the ground; that, as he reached a point on the road opposite the cow, the cow drew the chain taut, thus raising it from the ground; that the horse stumbled over the raised chain and received the injuries for which the plaintiff brings suit. The plaintiff further claims that until the time of the accident he could not see the chain, nor was he aware of its presence in the road. The answer of the defendant is substantially a general denial.

The defendant moved to dismiss the complaint, upon the ground that there was no proof of any statute in the State of New Jersey, which made it illegal to suffer domestic animals to go unattended on the highways. There was no proof of any statute on the subject, and it may be conceded that, as contended for by the defendant, in the absence of any statutory inhibition, the presence of domestic animals on the highway unattended was not unlawful. *Bowyer v. Burlew*, 3 T. & C. 362; *Holden v. Shattuck*, 34 Vt. 336. But the injury in this case was not occasioned by the animal itself, but from the manner in which it was tethered. Though the defendant had the right to suffer the animal to be on the highway, he had no right to secure it in such a manner that the cow could obstruct the highway. In *Holden v. Shattuck*, *supra*, the leading authority in support of the right to place cattle on the highway, it is said: "There may be times and occasions when it would be culpable fault so to do, and would subject the owner to such damage as might result therefrom. For instance, to permit animals to occupy the highway by night with the likelihood of lying down for their rest in the travel path, and by thus obstructing it, causing accident and damage." Within this rule the question of negligence, as to the manner in which the animal was secured on the highway, was for the jury. The cow being the property of the defendant, it is to be presumed that she was placed on the highway in use for his benefit and on his account. *Norris v. Kohler*, 41 N. Y. 42; *Seaman v. Koehler*, 122 Id. 646. Despite, therefore, the denial by the defendant and his servant, this presumption raised a question of fact to be determined by the jury.

The defendant's request to charge that, in the absence of proof of the statute of New Jersey relating to highways, it must be presumed that the common law prevails, and by the common law it was not negligence to tether cattle by the side of the public highway, so far as the request was correct, was sufficiently covered by the previous charge. The court had already charged: "If she (the cow) had been altogether loose—that is, not tied to anything—there would be no liability." But there is no authority for the claim that it is lawful to so secure an animal in the public highway that it will naturally and probably obstruct the highway.

Judgment affirmed.

Opinion by CULLEN, J.

GEIPEL v. STEINWAY RAILWAY COMPANY OF LONG ISLAND CITY.

*Supreme Court, New York, Appellate Division, Second Department,
February, 1897.*

COLLISION—HORSE BACKING ON TRACK IN FRONT OF STREET CAR.—In an action for injuries to plaintiff's horse and wagon, where it appeared that the roadway between the defendant's track and the outer embankment was only nine or ten feet wide, that when the electric car, that was traveling at the rate of ten miles an hour and could be stopped in a distance of fifteen feet, was seventy-five or a hundred feet away, the plaintiff's horse became frightened and backed the wagon upon the track, and that the plaintiff tried to attract the attention of the motorman, but he was not looking the way the car was going and a collision resulted, a verdict for the plaintiff would not be disturbed.

APPEAL from judgment, Supreme Court, Kings County, in favor of plaintiff.

JESSE JOHNSON, for appellant.

ALMET F. JENKS, for respondent.

BRADLEY, J.—The plaintiff, when proceeding northerly on Lockwood avenue, in Long Island City, in her two-wheeled vehicle, drawn by one horse, driven by her, was injured by collision with the defendant's trolley car, going in the other direction. The plaintiff charges that the collision and injury were attributable solely to the negligence of the defendant. The evidence on the part of the plaintiff tends to prove that the roadway for wagons there was narrow—only about nine or ten feet between the railroad track and the outer embankment; that when the car was from seventy-five to a hundred feet away, approaching, the plaintiff's horse became frightened, and began to rear and back up, and backed her wagon onto the railroad track; that she then held up her hand, made motions, and hallooed for the car to stop; that the car did not slack its speed, but proceeded rapidly up near to, or at, the point of collision; and that, when the plaintiff gave such signals, she did not get the attention of the motorman, because he was not looking in the direction the car was going, but that his attention was then being given to a ball game going on off in another direction. There is a distinct and irreconcilable conflict in the evidence introduced by the parties, respectively, bearing upon the main issue, and we cannot undertake to say where the truth is on the subject, urther than to conclude that the jury found and reflected it by the verdict. It is quite evident that

the plaintiff's wagon was not, nor was her horse, on the railroad track at the time of the collision, but they were so near the track that in some manner the wagon and horse were struck by the car, or, by reason of the fractious movement of the horse, it and the wagon came in contact with the car, when it reached the place where they were, causing the plaintiff's injury. The evidence on the part of the plaintiff tends to prove that the car struck the horse and wagon. The precise manner in which the collision occurred may not be an essential fact, and it is not so if the situation of the plaintiff, with her horse and wagon, was such as to have required the motorman, in the exercise of reasonable care, to slack up or stop his car when at such distance from the place of the accident as to enable him to do so and he did not. It concededly appears by the evidence that the car, when going at the rate of ten miles per hour, could be stopped in fifteen feet. And if, as the evidence on the part of the plaintiff tended to prove, her situation was apparently one of danger (if the car proceeded as it was going) when it was seventy-five to one hundred feet away, and such situation should, and by the exercise of ordinary care would, have been seen by the motorman, and the car continued to go rapidly up to or near the point of the accident, the conclusion was permitted that the defendant was chargeable with negligence, and that such negligence was the cause of the calamity; also, that the plaintiff was free from contributory negligence. Whatever view we might have had of the case if the evidence had come to us for an original determination upon the merits, we cannot, in view of the fact that the jury saw and heard the witnesses, say that their verdict, founded upon the conflict in the testimony of the witnesses, is against the weight of the evidence.

There appears to be no error to the prejudice of the defendant on any rulings at the trial. Nor is it evident that the verdict was excessive in amount.

The judgment and order should be affirmed.

All concur.

MURPHY v. McWILLIAMS.

*Supreme Court, New York, Appellate Division, First Department,
February, 1897.*

FALL OF DERRICK—GUY WIRES.—In an action for injuries occasioned by the fall of a derrick, evidence that the guy wires should be strung from the post at right angles in order to make it safe, and there was evidence

that the posts were pulled out of the ground by the guy wires without disturbing the ground, warranted the jury in finding that the derrick was negligently constructed.

APPEAL from judgment, Supreme Court, New York County, in favor of plaintiff, who was injured on April 6, 1893, at Latintown, N. Y., by the fall of a derrick erected by the defendant's servants. The plaintiff was in the employ of the Neufchatel Asphalt Company, which was doing the asphaltting work upon a structure known as the Pratt Mausoleum, and the defendants were engaged in laying the stone work. The fall of the derrick was occasioned by the pulling out from the ground of two posts, known as guy posts. There were six of these posts from which wires were strung, the other ends being attached to the top of the mast of the derrick in order to relieve the strain put upon it by the weights lifted.

ABRAM I. ELKUS, for appellants.

J. LANGDON WARD, for respondent.

The plaintiff's freedom from contributory negligence was clearly established; but the defendants strenuously contend that there is no evidence in the case showing negligence in the construction or operation of the derrick. There was, it is true, no expert testimony tending directly to show such negligence, but we think that the jury had the right to infer its existence from the proof. The plaintiff's witness Martin, a civil engineer, who had had much experience in the handling of heavy weights by derricks, testified, without contradiction, that the guy wires should be strung from the posts at very nearly a right angle. No direct evidence of the angle was given, but the plaintiff proved by two witnesses that the bark which had been on the posts that were pulled out was left in the holes, and that the earth around the holes was very little disturbed. We think that the jury might draw from this a *prima facie* inference that the wires were strung at an angle considerably greater than a right angle, since, if the pressure had been exerted at a right angle, it seems hardly possible that the posts should have been drawn out so cleanly, with little or no disturbance of the bark or the ground. This inference is not rebutted, or seriously weakened, by the defendants' evidence. No evidence was offered—as would have been natural if any existed—to show that the angle was, in fact, a right angle.

Upon the whole evidence, we think that the jury were justified in finding that the guy wires were not attached to the posts at a right angle, but at a considerably greater one; that such a construction was negligent; and that it caused the accident and the plaintiff's injuries.

It should also be noticed that the evidence as to the manner of lining the holes was not undisputed. The defendants' foreman, Johnson, testified that they were lined at the bottom with stones. There was proof that this is the usual and proper method of construction. But Johnson's testimony was disputed by his helper, O'Neil, who said that no stones were used; and an issue for the jury seems to have been thus presented.

Judgment affirmed.

Opinion by BARRETT, J.

SUHRADA V. THIRD AVENUE RAILROAD COMPANY.

*Supreme Court, New York, Appellate Division, First Department,
February, 1897.*

INJURED WHILE BOARDING STREET CAR—SETTING ASIDE VERDICT.—Where there was conflicting evidence as to whether the car was or was not moving when the plaintiff attempted to board it, and the plaintiff's contention was sustained by himself and one other witness, whose testimony was somewhat discredited by his cross-examination, and refuted by five witnesses, four of whom were entirely disinterested, and all of whom had an opportunity to see the occurrence, the action of the trial judge in setting aside the verdict for the plaintiff as contrary to the weight of evidence would not be disturbed.

APPEAL from order of Supreme Court, New York County, setting aside verdict in favor of plaintiff.

SUMNER B. STILES, for appellant.

WILLIAM N. COHEN, for respondent.

The plaintiff was injured while attempting to board a car on the defendant's railroad, in August, 1894. The question presented upon the trial was whether the car had stopped when the plaintiff attempted to get on board of it, and he was injured by the sudden starting of it before he was able to get his footing upon the car, or whether he attempted to board the car while it was in motion, and was thrown down, and hurt. The question was submitted to the jury by the trial judge, with appropriate instructions, and by them a verdict for the plaintiff was returned. On the coming in of that verdict, upon motion of the defendant, the trial judge set it aside, because it was against the weight of evidence, and from his order this appeal is taken.

The only question, of course, brought up for review upon such an

appeal, is whether, upon the whole case, it has been made to appear by the appellant here that the trial judge erred in setting aside the verdict. The burden of proof is upon the plaintiff. To sustain it, he gives his own testimony and that of one other witness, who is, to say the least, somewhat contradicted and discredited by his own cross-examination. On the other hand is presented the testimony of five witnesses, four of whom, at least, are entirely disinterested, all of whom had an opportunity to see the occurrence which is the subject of examination, and every one of them testifies positively to facts which contradict the testimony of the plaintiff's witnesses. Upon such a state of affairs, it is quite clear that a case is presented where great weight should be given to the conclusion of the trial judge, who saw the witnesses, and had the benefit of listening to their oral examination.

For these reasons, we agree with the conclusion of the trial judge that justice is more likely to be attained by setting aside this verdict, and directing a new trial before another jury, where this question can be examined over again.

Opinion by RUMSEY, J.

CLARK v. THAYER.

*Supreme Court, New York, Appellate Division, Second Department,
February, 1897.*

COLLISION OF YACHTS BEYOND FINISH LINE OF RACE.—Where the plaintiff's yacht was run into by defendant's yacht that was a contestant in a race, and both belonged to the New York Yacht Club, the sailing rules of the club governed both yachts while the race continued, though they differed from the rules of navigation enacted by Congress, but after the finish line was crossed the latter rules again governed.

APPEAL from order of Supreme Court, New York County, setting aside verdict of jury in favor of plaintiff. The verdict was for \$4,500 damages for injuries to plaintiff's person, and \$450 for injuries to his yacht. The appeal was transferred from First Department.

GEORGE RICHARDS, for appellant.

PETER B. OLNEY, for respondent.

This action is brought to recover damages for injuries to the plaintiff's person, and also to his property, caused by a collision between defendant's yacht and that of the plaintiff, in Newport Harbor. Both yachts were in the fleet of the New York Yacht Club

on its annual cruise. On the cruise there appear to have been races from harbor to harbor for such vessels of the fleet as the owners might choose to enter. The run was from New London to Newport Harbor. There were some ninety or one hundred vessels in the fleet, of which some thirty odd entered the race between those two points. The goal of the race was an imaginary line between the stake boat in the entrance to Newport Harbor and a point on the shore. Defendant's yacht competed in the race. That of the plaintiff did not. The collision took place in Newport Harbor, beyond the finish line of the race. How far beyond that line the accident happened involves the most serious conflict of fact in the case. The plaintiff's yacht was in advance of that of the defendant, so that the defendant's yacht was an "overtaking vessel." Both yachts were running free, with the wind on the same side. The plaintiff's yacht was to the leeward. It was, therefore, the duty of the defendant's yacht, under the rules of navigation enacted by Congress, to keep out of the way of the plaintiff's yacht, except for the application of a rule of the club. This rule is as follows: "Yachts not in Races. All yachts not racing must be kept to leeward, and out of the way of racing yachts." We think this rule bound the plaintiff, as a member of the club, and so the trial court properly held. We think it also clear that this rule applied, not only to the course from start to finish, but for a reasonable distance after the finish. But from the finish line the club rule did not apply with the same force as it did to the course of the race itself.

We have examined the exhaustive opinion delivered by the trial judge, granting a new trial, but it has failed to satisfy us that the verdict was so manifestly **against** the evidence as to justify the court in setting it aside. **We** think there was a clear-cut question of fact to be determined **by** the jury. As already said, we think the defendant's yacht, up to the finish line, had the right to keep her course absolutely, without deviation on account of the plaintiff's boat; and also to carry every yard of canvas that was thought advantageous. If it was certain that from so holding her course, or from the sail she carried, the collision with the plaintiff's boat had been caused, we would be clear that the plaintiff was at fault, and could not recover. But, after the finish line was passed, then it was the duty of the defendant's yacht to observe the ordinary rules of navigation, so far as her speed, position, and condition and the surrounding circumstances permitted. She was, therefore, bound to keep away from the plaintiff's boat, if that were practicable. Whether it was practicable or not was a fairly debatable question, on the evidence in this case. So, also, on the question of

the plaintiff's contributory negligence. If the circumstances were such that the defendant's yacht could have borne away, the master of the plaintiff's boat was justified in holding his course, and assuming the defendant's boat would comply with the rules of navigation; for at that time the existence of the race had no bearing on the maneuvering of defendant's yacht. The race had been won or lost already. There was, at the time of the collision, no reason why the racing yacht should have the superior right of way over the non-racing yacht; a right of way denied to it both by the act of Congress, and also by the ordinary navigation rules of the club. The race had this effect, and this only: it had brought the defendant's yacht to the position that it occupied, carrying all sail; but on the evidence the jury could have found that it was not the position of the defendant's yacht nor the sail she carried, but her failure to bear away, which caused the injury. Indeed, the questions of the plaintiff's contributory negligence and the defendant's negligence are so interwoven as to be difficult of separation. We think on both there was a fair dispute of fact for the jury to decide.

The plaintiff has offered to remit that part of the verdict which awards him compensation for the injury to his boat. This offer removes from the case the question of the sufficiency of the evidence to justify the verdict in this respect.

The order granting motion for a new trial should be reversed, without costs, on plaintiff stipulating to deduct from the verdict the sum of \$450.

Opinion PER CURIAM

MCMALE v. FIDELITY AND CASUALTY COMPANY.

*Supreme Court, New York, Appellate Division, First Department,
February, 1897.*

INJURED BY DESCENDING ELEVATOR—ELEVATOR INSPECTOR.—

Where an elevator inspector requested an engineer who had assisted at previous inspections, to remove the covering at the bottom of the elevator shaft, and then ordered the elevator attendant to go up slowly in the hearing of the engineer, but whether he ordered the attendant to come down was in dispute, and the inspector then went into the engine-room to inspect the driving belt, while the machinery was in motion, and from which room the elevator could not be seen, and while there the elevator came down and

injured the engineer while he was removing the covering, there was no evidence of negligence on the part of the inspector, even admitting that he ordered the elevator attendant to come down.

APPEAL from judgment, Supreme Court, New York County, in favor of plaintiff.

PERRY D. TRAFFORD, for appellant.

C. M. EARLE, for respondent.

This action was brought to recover damages sustained by the plaintiff, an engineer employed in the building No. 237 Mercer street, in the city of New York, and which he claims were occasioned by the negligence of an elevator inspector employed by the defendant. There is only one point upon which there is any conflict of evidence in the case. In the course of its business, the defendant was in the habit of inspecting elevators; and upon the day of the accident, one of its inspectors visited the premises in question, for the purpose of inspecting the elevator, which had been done repeatedly before. The plaintiff was an engineer, and for some years prior to the accident had been in charge of the elevator machinery in the building, and was entirely familiar with its operation and management, and had been present at many inspections. The person who ran the elevator had been employed at that work for about a year prior to the accident, and continued in such employment until the time of the trial. The building was five stories high, and the elevator was a passenger elevator running to the top of the building. It was worked by three cables, winding on a drum, turned by an engine. As the drum was wound up, the car was hoisted; and, as it unwound, the car was lowered. Opposite the elevator shaft, and separated from it by a brick partition, was the engine-room. One in the engine-room could see the hoisting cable, but could not see the elevator drum nor the position of the elevator car in the shaft. At the bottom of the shaft, near the front, and just below the level of the floor, was a wooden box covering some sheaves. Part of the duty of the inspector was to inspect these sheaves and also the driving belt. In order to make a proper inspection of the driving belt, the machinery had to be in motion, and it had been customary to take off this cover of the sheaves for the purposes of inspection. After the inspector had proceeded for some time with his inspection, he was desirous of examining the driving belt, and had a candle in his hand for that purpose. The engineer, the attendant of the elevator (the elevator apparently being at the bottom of the shaft), and the inspector were standing at the shaft. The plaintiff states that he was requested by the inspector to remove the box. Thereupon, for the purpose of

inspecting the belt, the inspector gave an order to the elevator attendant to go up slowly, as he and the plaintiff testified, but the elevator attendant says that the order was to go up slowly, and to come down slowly. The inspector then went into the engine-room, for the purpose of examining the belt while in motion, and the plaintiff went into the elevator shaft, and commenced to take off the cover from the sheaves. He was stooping down for that purpose when the elevator came down upon him, and, upon giving a cry, it was heard by the inspector, who rushed out from the engine-room, and caused the elevator to rise, and pulled out the plaintiff, who had been considerably injured. This action was brought for the purpose of recovering damages for such injuries. Upon the trial a verdict was rendered for the plaintiff, and a motion was made for a new trial upon the judge's minutes, which was denied. From the judgment and order thereupon entered, this appeal is taken.

The question involved upon this appeal is as to whether there was any evidence of negligence upon the part of the defendant's inspector. It is claimed that, in view of this order to come down, it was the duty of the inspector to remain by the shaft and to warn the plaintiff when the elevator came down. But the evidence shows conclusively that the plaintiff went in, knowing that the inspector would not give him any such warning, and would not remain there while he was taking off this box. He knew that the elevator was being moved for the purpose of inspecting the belt; he knew that the inspector was going into the engine-room for that purpose, and that from the engine-room he could not see the position of the elevator in the shaft, although, perhaps, he might see some of its cables. He went of his own volition into the shaft to take off this box, and paid no attention whatever to the position of the elevator, although the drum was within a short distance of him, in plain sight, from which he could tell the position of the elevator at any time. Under these circumstances, it is difficult to see upon what ground negligence of the inspector can be predicated. The plaintiff knew that the inspector was not going to remain, but that he was going into the engine-room; and, knowing these things, he took the risk of going into the shaft and having the elevator come down upon him.

Judgment reversed,

Opinion by VAN BRUNT, P. J.

JOSSAERS v. WALKER.

*Supreme Court, New York, Appellate Division, First Department,
February, 1897.*

ELEVATOR IN HOTEL — USING TOP AS SCAFFOLD.— A servant employed to run an elevator in a hotel is not acting within the scope of his authority when he permits, without the knowledge of his employer, a workman to stand upon the top of the elevator and use it as a scaffold to make some alterations for a refrigerating plant, contracted to be put in by the latter's employer, and the hotel proprietor is not liable to the workman for injuries occasioned by the starting of the elevator, without notice from the servant.

APPEAL from judgment, Supreme Court, New York County, in favor of plaintiff. The action was for injuries sustained by plaintiff on April 9, 1894, caused, as alleged, by the negligence of the defendant. The defendant is proprietor of the Hotel Beresford, in the city of New York, into which a Buffalo firm was putting a refrigerating plant. The plaintiff was sent by his employer, a carpenter, to do certain work in and about the elevator shaft of the hotel, which was incident to the putting in of the plant. He made an arrangement with the elevator man whereby he was permitted to get on the top of the elevator and the elevator man notified him when he was about to move it up or down. On one occasion he neglected to so notify the plaintiff and the sudden starting of the elevator caused the injuries complained of.

ALEX. THAIN, for appellant.

SUMNER B. STILES and FRANCIS L. WELLMAN, for respondent.

BARRETT, J.— The crucial question here is as to the defendant's responsibility for the particular acts of negligence alleged to have been committed by Paxter, the man in charge of his elevator. The defendant was not notified of the arrangement made between the plaintiff and Paxter, nor was it shown that he was aware of the use to which the elevator was being put under that arrangement. There was, in fact, no proof that he ever assented, expressly or impliedly, to that use. The question then is, was that use within the scope of Paxter's authority? We think not. Paxter was the defendant's servant to operate the elevator for the service of the hotel and its guests. Whatever was necessary or proper for that service was within his authority. But there his authority ceased. It was limited to the appropriate use. He was not authorized to depart from his defined function, nor to operate the elevator in a direction

foreign to its proper purpose. Here he permitted the plaintiff to utilize this elevator as a species of scaffold upon which to do his work. This work was not done under the defendant's direction. It was work which the plaintiff did, primarily, for one Craig, a carpenter, and it was incident to the putting into the hotel of a refrigerating machine by a firm in Buffalo. The elevator was not placed where it was, nor was it intended to be used, for any such purpose as that to which it was here applied. Paxter's act in permitting that use was entirely outside the scope of his employment as elevator man of the hotel. He thus diverted the elevator from its normal and legitimate use, and put it to a use which was not contemplated either in its construction or operation, or in his employment with regard thereto. It follows that Paxter's negligence was his own, and not the defendant's.

The judgment and order denying the defendant's motion for a new trial should therefore be reversed, and a new trial ordered, with costs to the appellant to abide the event.

All concur.

ZIMMERMAN v. LONG ISLAND RAILROAD COMPANY.

*Supreme Court, New York, Appellate Division, Second Department,
February, 1897.*

INJURED WHILE ALIGHTING.—Where a passenger was injured while alighting by the slack in the rear cars being taken up, causing a vibration throwing her off, the company was liable.

DAMAGES.—Evidence of an item of damage not alleged in the complaint was improperly allowed to be submitted to the jury.

APPEAL from judgment, Supreme Court, Kings County, in favor of plaintiff.

W. C. BEECHER, for appellant.

F. E. DANA, for respondent.

The plaintiff was a passenger on defendant's train, riding in one of the rear open cars having seats crosswise of it. The train was carried beyond the platform of a station because of a grade, and when the train stopped the trainman called out to the passengers to hurry up. The plaintiff stepped upon the running board on the side of the car when there was a sudden jerk and she fell to the ground and was injured. The accident occurred about ten o'clock

in the evening, and there were no lights and no platform at the place. The evidence showed that the jerk was caused from the fact that vacuum brakes were only used on the front cars of the train, those in the rear being thus left to settle back and to slack up again. The haste in movement which the passengers were invited to make, without any warning of the danger which might be occasioned by the vibration or rebounding of the car, the darkness and the absence of any platform to step to, were circumstances which permitted the jury to find that the injury of the plaintiff was attributable to the negligence of the defendant, and that the plaintiff was free from the imputation of contributory negligence. The plaintiff testified that after her husband's death she paid for help a sum the outside figure of which was five dollars a week. No such matter was alleged in the complaint, but the defendant's counsel in making objection to the evidence did not specify that as a ground for it, his objection is not available. But as there is some doubt about the sufficiency of the evidence, defendant's exception taken to the submission of that matter to the jury is entitled to such consideration as to render it prudent to exclude from the recovery the amount which the jury could have allowed for such cause, but the plaintiff should have costs if she consents to the deduction and consequent modification.

Judgment so modified affirmed.

OPINION by BRADLEY, J

SMITH V. BAILEY.

*Supreme Court, New York, Appellate Division, First Department,
February, 1897.*

CROSSING SWEEPER RUN OVER.—Where a street sweeper was knocked down and run over by a passing vehicle, and there was conflicting evidence as to whether he stepped backwards and in front of the vehicle or not, the questions of negligence were for the jury.

EVIDENCE OF NEGLIGENCE.—The fact that the driver of the wagon came back and told the sweeper that if he was hurt he would be glad to do anything he could for him, and subsequently went to the sweeper's house and gave him ten dollars and asked if he could do anything more for him, was not an admission of negligence.

APPEAL from judgment of Supreme Court, New York County, entered in favor of defendant upon a verdict directed by the court.

HERMON H. SHOOK, for appellant.

LOUIS H. HAHLO, for respondent.

This action is brought to recover damages alleged to have been sustained by the plaintiff by the defendant driving over him while he was at work for the city of New York in the department of public works, sweeping the north crosswalk of Seventh avenue, at the corner of 132d street. He was sweeping on the west side and was facing south, being about three or four feet from the west curbstone; hence he had his back towards the teams which were coming upon the right-hand side of the avenue. There were a great many vehicles around there at the time; according to one of the witnesses, about twenty-five. The defendant, who was driving a horse and wagon at a moderate gait upon the west side of the avenue, struck the plaintiff and knocked him down and his wagon ran over him. The defendant testified that he was driving down the avenue, and, just as he got opposite the plaintiff, the plaintiff stepped back, to avoid another team going on the avenue, and went directly in front of the defendant's horse, and was knocked down and run over before the defendant could stop. After the accident the defendant drove around the corner, let the lady out, who was riding with him, and then turned and came back. The plaintiff was carried into a drug store, and the defendant saw him there and told him that, if he was hurt in any way, anything he could do for him he would be glad to do. A doctor was there who dressed the plaintiff's wounds, and subsequently the defendant went to the plaintiff's house and paid him ten dollars and asked him if he could do anything more for him. The plaintiff declined any further assistance, and the next thing the defendant heard from him was when some one came into his office and asked if he was going to settle with Smith. The questions arising are whether there was evidence of negligence and absence of contributory negligence to go to the jury. It cannot be expected that persons engaged upon the streets in the public service should exercise the same diligence in getting out of the way of passing vehicles as those persons who are simply crossing the streets. They are bound, however, to use reasonable care in seeking to avoid the dangers by which they are surrounded. Whether the plaintiff was guilty of negligence in facing south, when he knew his back would be to all the vehicles which came in his direction, was for the jury. As to the negligence of the defendant, he says that the plaintiff stepped back to avoid another team and went directly in front of the defendant's wagon, and that it was impossible for the defendant to stop before the plaintiff was knocked down and run over. In this evidence the defendant was supported by the lady who was riding with him; and, if this were the case, there, was of course, no ground upon which the defendant could be held guilty of negligence. The

plaintiff, upon the other hand, states that he did not step back, and the other witnesses do not seem to throw any light upon this point. There was therefore an issue between defendant and plaintiff which was for the jury to determine. It was claimed that the interest which the defendant manifested in the injuries of the plaintiff was an admission of negligence upon his part. We cannot find anything in the record which would justify any such inference.

Upon the whole case we think the questions of negligence should have been submitted to the jury.

Judgment reversed.

Opinion by VAN BRUNT, P. J.

FELSKA v. NEW YORK CENTRAL AND HUDSON RIVER RAILROAD COMPANY.

Court of Appeals, New York, March, 1897.

COLLISION AT RAILROAD CROSSING—EVIDENCE—FLAGMAN.—In an action for death, caused by a collision at a railroad crossing, where the absence of the flagman was a material inquiry at the trial, evidence of a witness that he heard some one in the crowd, at the scene of the accident, say that the flagman "did not attend to his business good," was improperly admitted.

OPINION OF WITNESS AS TO DECEASED BEING INTOXICATED.—It was error not to permit a competent witness, who had seen the deceased on the occasion in question and who was able to describe his actions, words and conduct, to express an opinion as to whether the deceased was or was not intoxicated.

APPEAL from judgment, Supreme Court, General Term, in favor of plaintiff.

JAMES F. GLUCK, for appellant.

GEORGE W. COTHRAN, for respondent.

The plaintiff recovered a judgment in this action for damages for negligently causing the death of her husband and intestate in a collision which occurred at the Broadway street crossing, in Buffalo, on the 22d of December, 1892. It appears that the deceased and another person started from a saloon, in a wagon drawn by a single horse, driven by the deceased, and that when attempting to cross the tracks of the defendant the accident occurred which resulted in his death. The day was clear and bright, and the evidence in behalf of the defendant tended to show that there was no difficulty in

seeing the train in either direction as the crossing was approached. The negligence charged against the defendant was the great speed of the train, the failure to give signals of any kind of its approach and the neglect of the flagman at the crossing to give any warning; and it is claimed that he was absent from his post of duty. On the other hand, it is contended that the deceased was himself guilty of negligence contributing to the accident, and to his own death in driving up to and on the crossing with a horse and wagon at a high rate of speed, without looking either way, when the approaching train was in plain sight. The deceased and his companion had been trading horses in the saloon and had been drinking, but whether much or little is in doubt. The testimony in support of plaintiff's case is open to criticism, as being in some respects contradictory and improbable. But still the credibility of the witnesses and the force and effect of the testimony was for the jury. We have no power to review the facts. The absence of the flagman was a material inquiry. The court permitted a witness for the plaintiff to testify, against the defendant's objection and exception, that he was present just after the accident at the crossing, and heard the bystanders talking about the absence of the flagman, and that he heard it said by some one in the crowd, "that he did not attend to his business good." The testimony of this witness as to what he heard some person in the crowd say was, of course, nothing but hearsay. We think the defendant's objection to this testimony was well taken. *Butler v. Railway Co.*, 143 N. Y. 417, 38 N. E. 454. The condition of the deceased at the time he attempted to drive across the track—whether intoxicated or not—became a material inquiry upon the trial. A witness for the defendant testified that "one man got into the wagon first and the other one tried to get into the wagon and he kind of stumbled into the wagon." The witness also testified: "The way he walked and got into the wagon it looked as if he was intoxicated." On motion of plaintiff's counsel, the court ordered the latter testimony stricken out, as it was the expression of an opinion. The defendant excepted. This testimony was directed to the condition of the two men when they got into the wagon at the saloon, and it was clearly shown by other testimony that the man who got in last was the deceased. We think that it was not error to permit a competent witness who had seen the deceased on the occasion in question, and who was able to describe his actions, words and conduct, to express an opinion as to whether he was or was not intoxicated. The inquiry was material and the defendant was entitled to give such proof on the subject as tended to establish the fact. *Ferguson v. Hubbell*, 97 N. Y. 507, in which

it is said, "Witnesses may give their opinions on questions of identity or whether a person is under the influence of liquor, and as to many other matters."

Judgment reversed.

Opinion by O'BRIEN, J.

WILLIS v. ATLANTIC & DANVILLE RAILROAD COMPANY.

Supreme Court, North Carolina, March, 1897.

COLLISION—RES GESTÆ.—Where plaintiff was injured in a collision while riding on a hand car, by permission of one of defendant's employees, proof of a conversation soon after the accident between the section-master and the conductor of the train was incompetent, being no part of the *res gesta*.

RULES AND REGULATIONS—EVIDENCE.—It was improper to exclude evidence on part of defendant as to the rules and regulations in regard to persons not employees riding on hand cars and the custom in regard thereto.

APPEAL by defendant from judgment rendered for plaintiff in the Superior Court, Caswell County.

E. B. WITHERS, W. A. FENTRESS and A. P. THORN, for appellant.
J. A. LONG and J. W. GRAHAM, for appellee.

The issues submitted by the court, without exception by either party, were: 1. Was the plaintiff injured by the negligence of the defendant, as alleged in the complaint? 2. Was the plaintiff guilty of contributory negligence? 3. After the plaintiff's negligence, could the defendant, by the exercise of reasonable care, have avoided injury to the plaintiff? The jury answered each issue, "Yes." Defendant's road runs from Norfolk to Danville, Va., and a section of it lies between Danville and Blanch Station of several miles in length, including Moore's Creek trestle. C. E. Vaughan was the section master on said section, with several hands at work. He was using a hand car, which was used to carry hands and tools to and from their work. The plaintiff was walking along the track of the defendant between Moore's Creek and Blanch Station when the hand car passed him, going towards Blanch; and he asked permission to get on the hand car and ride, and he was permitted to do so by the section master. This was on August 6, 1895, and plaintiff says he was hurt between five and six o'clock P. M. Four or five hundred yards out from Blanch is a sharp curve in the road, with

banks twenty or thirty feet high. While rounding this curve, an excursion train from Norfolk struck the hand car, and plaintiff was injured. The section master and hands jumped off, and were not hurt. The engineer was on the lookout, but did not see, and could not have seen, the hand car in time to prevent the collision. There was no evidence that passengers either habitually or occasionally rode on this car. No fare was paid or charged. There was no arrangement or seats on it for passengers, and it was used only for transporting employees and their tools. It was the duty of the section master to keep the road and bridges in repair. Upon these facts, the plaintiff alleges that he was a passenger on defendant's road, and was entitled to the same care and protection as other passengers, and that defendant owed him the same duty as if he had been on a passenger train. The defendant denies this proposition, and avers that plaintiff had only the rights of any stranger walking along defendant's roadbed, and insists that the permission of the section master to allow plaintiff to ride on the car, and thereby establish the relation of passenger and carrier between the plaintiff and defendant, was *ultra vires*. This is the principal question on the merits of the case.

We find in the exceptions ground for a new trial, but it will not be improper for us to give our opinion on the principal question. The law of common carriers will not solve this question. It must be settled by the principles of the law of agency. The defendant is a common carrier, but every employee of the defendant is its agent, with such powers as pertain to the duties of his department, or such others as may be expressly given him. And this presents the question whether the section master, as an agent of the defendant, had authority to take the plaintiff on the hand car in such a way as to fasten on the defendant the duties of a carrier to him as a passenger. It must be conceded that any carrier has a right to make reasonable regulations in the management of his business. He may, if he sees fit, have the freight and passenger business carried on upon the same train under one management, or he may completely separate these transactions by arranging them in distinct departments. He may have a conductor for a freight train and a conductor for a passenger train, but such conductors would have very different powers. The name has but little significance. The law would confer upon one such authority as was incident to the business of moving freight, and no authority for moving passengers. This would clearly be so to one having actual notice of such a division of the business. The carrier may also arrange and allow freight to be carried on the "hand car," and the law would confer

on the section master such authority as was incidental to the business in which he was engaged, but no authority as to the transportation of passengers. In the great transactions of commercial business and corporations, as railroads and the like, convenience requires a subdivision of their work among numerous agents, each of whom may have a distinct employment, and is a general agent in his particular department, with no powers beyond it. He is identified with his master to that extent only. In the absence of actual notice of the extent of the power of these agents, is there anything in the nature and apparent division of the business which would imply notice to a supposed passenger, as the plaintiff in this instance? There is no real analogy or resemblance between the duties of a conductor of a passenger train and those of a section master in charge of a hand car. A different class of men would be employed for such places, and the principal (the defendant) would have a right to assign specific and distinctly separate duties to each. The difference in the appearance of a passenger train and a hand car would be significant. The conveniences of the former and the inconveniences of the latter would suggest to a wayfarer that one was for passengers, and that the other was not. Such evidences in the actual operations of defendant's business would negative the conclusion that the carrier would allow passengers on the hand car, and would suggest that the authority of the foreman of the section was limited to the business in which he was actually engaged. Under such circumstances, although a stranger to the company may take a free ride with the foreman's assent, he could scarcely be regarded as a passenger, and the defendant as a carrier, as to him. The presumption, then, is, that one riding on a hand car is not legally a passenger; and it would rest upon him, under the circumstances of such cases, to rebut the presumption. This he may do by showing such general and continuous custom of the agent as would be notice to the principal and to the public, or that the agent had express authority from his principal, or that the rules and regulations did not inhibit such conduct. An agent cannot enlarge his powers by his own acts. They must be included in the acts or conduct of the principal. When the agency is limited, it is the duty of the person dealing with the agent to inquire into the nature and extent of the authority conferred, and to deal with the agent accordingly. *Clark*, Cont. 734; *Ferguson v. Manufacturing Co.*, 118 N. C. 946, 24 S. E. 710; *Biggs v. Insurance Co.*, 88 N. C. 141. Railroads have the right, as before stated, to make a separation between the different departments of their business, and, when this is done, the section master has such general authority only as is incidental to the duty

assigned to him, and no power whatever as to the transportation of passengers, and notice of this limited authority will be implied from the natural and apparent divisions of the business.

As to the first exception: Plaintiff proposed and was allowed, under defendant's objection, to prove a conversation soon after the accident, between the section master and the conductor of the train. This was no part of the *res gesta* and was incompetent. *Southerland v. Railroad Co.*, 106 N. C. 100, 11 S. E. Rep. 189.

The third exception: Defendant asked the witness Vaughan, "What were the rules and regulations of the company in regard to persons not employees of the company riding on hand cars, and what was witness's custom in regard thereto?" Plaintiff's objection was sustained and defendant excepted. Plaintiff, having certainly implied notice of the limited authority of the section master, still had the right to show express authority from the rules and regulations of the company that he (the section master) had authority to receive passengers on his car, and that he occasionally did so, and for a similar reason defendant had the right to show that by said rules the foreman's authority was limited, and what was his custom. The exclusion of the evidence was erroneous.

Judgment reversed.

Opinion by FAIRCLOTH, CH. J.

BEACH ET UX. V. WILMINGTON AND WELDON RAILROAD COMPANY.

Supreme Court, North Carolina, March, 1897.

OVERFLOW—OWNERSHIP OF LAND—INSTRUCTION.—In an action to recover for damages to land, by overflow, caused by alleged negligent construction of roadbed, an instruction that the roadbed was constructed before ownership of land became vested in plaintiffs, and therefore plaintiffs could not recover was properly refused, there being no other issue raised on the point of ownership by defendant.

PERMANENT DAMAGE.—The issues submitted covering only permanent damage, and there being no evidence of simultaneous damage with construction of road, there was no presumption that such damage occurred before plaintiffs' ownership.

APPEAL from judgment for plaintiffs rendered in the Superior Court, Pitt County.

JOHN L. BRIDGERS, for appellant.

BLOUNT & FLEMING, for appellees.

DOUGLAS, J.— This action was begun in 1893. The complaint, among other things, alleges the ownership of the land, its previous proper drainage by the plaintiffs, the construction of the branch road in 1889, and the injury resulting from the diversion of the water. Paragraphs 5 and 6 are as follows: "5. That, in the construction of its road, the defendant dug or caused to be dug a ditch on each side of this bed of said road, whereby a large and unusual volume of water was diverted from its natural channel and proper course, and turned upon the lands and into the canal and ditches of the plaintiffs, thereby flooding the lands and choking the ditches with sand, mud, and trash, so that the diverted waters, as well as the waters of the plaintiffs' lands, became ponded upon the said lands, rendering the same (which heretofore yielded good crops) worthless, or nearly so for purposes of agriculture. 6. That by reason of said diversion of waters, said obstruction to the fall of plaintiff's canal and ditches, the defendant has, within the three years next before the bringing of this action, negligently and unlawfully caused large quantities of water to be poured upon the lands of the plaintiffs, to the great damage of the land and the crops growing thereon, to wit, five hundred dollars." The defendant requested the court to instruct the jury as follows: "That it is admitted that defendant's road was constructed during the year 1889, and, if you believe the plaintiffs' evidence, the plaintiffs acquired title to the land in the year 1890; that the original trespass or cause of damage was done by the construction of defendant's road in 1889, and the plaintiffs, not being the owners of the land at the time the original trespass was committed, cannot sustain their action, and are not entitled to recover anything in this action." This instruction was refused, and defendant excepted, which is the only exception before us. We think the instruction was properly refused. The jury found that the plaintiffs were the owners and in possession of the land, and no other issue on this point was submitted or tendered by the defendant. All of the issues were found in favor of the plaintiffs.

It appears from the evidence that these lands belonged to the *feme* plaintiff, having been allotted to her in 1890, in the division of her father's lands. When her father died does not appear, but certainly before the division of his lands in 1890. The plaintiffs are shown to have been in actual possession of one tract when the road was built, in 1889. The action was brought apparently to recover continuing damages for the three years next preceding, but by consent, or at least without objection, the issues were submitted covering only permanent damage. When this permanent damage occurred

does not appear, further than the allegation in the complaint that the injuries complained of were within three years next preceding the bringing of the action. The ditches dug in 1889, when the road was built, were the primary cause of the permanent damage, but the damage itself immediately resulted from the filling up of the plaintiffs' ditches with sand, mud, and trash, so that the diverted waters, as well as the waters of the plaintiffs' lands, became ponded upon the said lands, thereby rendering them practically worthless. These lands were not immediately on the railroad or adjacent to the right of way, and it is evident that the damage could not have occurred simultaneously with the construction of the road. The cause must precede the effect, and, as ditches do not fill up instantly, considerable time may have intervened. There can therefore be no presumption that the permanent damage occurred before the plaintiffs' ownership, and we find no evidence to that effect.

The case of *Ridley v. Railroad Co.*, 118 N. C. 1010, 24 S. E. Rep. 734, cited and approved in *Parker v. Railroad Co.*, 119 N. C. 685, 25 S. E. Rep. 722, lays down the rule that "the statute of limitations begins to run in such cases, not necessarily from the construction of the road, but from the time when the first injury was sustained." This means, of course, the first substantial injury, as it would be a hardship to require a plaintiff to bring an action when his recovery would necessarily be merely nominal, and yet would be a bar to any future action. The same rule would apply, by analogy, where the first substantial damage occurred after a change in ownership. The word "permanent," as applied to injuries and damages, is apt to mislead, as it is used not only in cases where the damage is all done at once, as, for instance, in the tearing down of a house, but also to those cases where the damage is continuing and prospective. In these latter cases the damage is called "permanent" because it proceeds from a permanent cause, and will probably continue indefinitely as the natural effect of the same cause. Such is this case, where the cause is apparently permanent, and the damage necessarily continuing or recurrent. The interests and convenience of the public will not permit the abatement of the nuisance, and the law does not contemplate an indefinite succession of suits. Therefore a lump sum is recoverable, at the demand of either party, in consideration of which the defendant acquires the right to discharge its ditches upon the plaintiffs' land. This is nothing more than an easement appurtenant to the defendant's right of way. The amount recovered is not the estimated sum of all future damages expected to result from a continuing trespass, for such damages, running indefinitely, perhaps forever, would be utterly incapable of

calculation; and, moreover, it would be giving the defendant a right to commit a wrong. The sum recoverable is the damage done to the estate of the plaintiffs by the appropriation to the easement of so much of their land, or such use thereof, as may be necessary to the easement. The right of leading and discharging surface water over or upon the land of another is always enumerated among the usual easements recognized both by the common and civil law. It is true it has been sometimes said that easements are acquired only by grant or prescription, but this applies only as between private parties, and is usually a mere denial of easement by parol. It does not apply to condemnation proceedings or other actions in the nature thereof. Indeed, this court had held, in *Blue v. Railroad Co.*, 117 N. C. 649, 23 S. E. Rep. 275, that nothing but an easement can be acquired by judgment of condemnation. While the opinion does not use the word "easement," it accurately describes an easement, and does use the appropriate term "servient tenement" as applied to the land itself. The right of the defendant to hereafter discharge its ditches upon the lands in question being an easement, acquired only by the result of this action, the plaintiffs are clearly entitled to the damages resulting from the acquisition of the easement. There is no allegation that the railroad company has ever paid any damages to any one for this injury, or in consideration of the easement.

In the argument of this case before us, counsel insisted that the opinions of this court in *Ridley's* and *Parker's* cases, *supra*, are mutually inconsistent, and that one or the other would necessarily be overruled in the decision of this case. Although the statute of limitations is not raised in this case, we have carefully examined the cases above cited, and can find no such inconsistencies, and certainly none relating to the principles herein involved.

The judgment of the court below is affirmed.

MONTGOMERY and CLARK, JJ., dissented.

DIXEY V. PHILADELPHIA TRACTION COMPANY.

Supreme Court, Pennsylvania, March, 1897.

STREET CAR LEAVING TRACK AND PASSENGER INJURED.—Where the plaintiff testified that she was standing in one of defendant's street cars, all the seats being taken, and was holding an overhead strap, when a sudden movement of the car threw her forward, injuring her spine; that the car seemed to jump and run across the track, and she would have fallen if

she had not been holding the strap; that she could not say that the car left the track, but she believed it did, it was sufficient to throw the duty of explanation upon the defendant, and a nonsuit was error.

APPEAL from judgment of nonsuit, Court of Common Pleas, Philadelphia County.

Mr. HUNN and F. C. BREWSTER, for appellant.

J. HOWARD GENDELL, for appellee.

The assignment to be considered relates to the refusal of the court to take off a judgment of nonsuit. The plaintiff was a passenger on a street car which was attached to a cable car. When she got on the car, all of the seats were taken, and she stood in the passage way, holding to an overhead strap. While she was in that position, a sudden movement of the car threw her forward, causing injuries to her spine. The point is whether her testimony was sufficient to raise the presumption of negligence and take the case to the jury. She testified that the car ran roughly when it started after she got on it; that it continued to run more roughly; and that after she had ridden a few squares, it seemed to jump and run across the track. The motion was so violent as to throw her forward and she would have fallen to the floor if she had not held the strap. On cross-examination she testified that she could not say that the car had left the track, but that it seemed to do so; that she believed that it did; that, at the time she was injured, the car seemed to leave the track, and to be pulled back again by the forward car; and that the passengers were thrown first forward, and then backward. These statements, culled from a lengthy examination and grouped together present the case with more directness and force than her testimony at the trial gave it; and we may now be considering it in a light more favorable to her than that in which it was presented to the learned judge at the time the nonsuit was entered. This testimony was sufficient to throw the duty of explanation upon the defendant. The plaintiff made out more than a mere case of the happening of an injurious accident to herself while a passenger, from an unexplained cause, or from a cause disconnected with the means of transportation. She showed the cause of the injury and the circumstances attending it, and that it affected, not her alone, but all the passengers. The cause was unusual, and within the knowledge and under the control of the defendant's employees, and it was sufficient to give rise to the legal presumption of negligence.

The judgment is reversed, with a procedendo.

Opinion by FELL, J.

EARLE V. ARBOGAST ET AL.

Supreme Court, Pennsylvania, March, 1897

LANDLORD AND TENANT—COVENANT TO RESTORE. — In the absence of an express covenant the law implies one that a lessee will restore the premises uninjured by any wilful or negligent act on his part, but not one that the lessee shall restore buildings which have been destroyed by accident without fault on his part.

DESTRUCTION OF LEASED BUILDING BY AN EXPLOSION. — Where buildings were destroyed by an explosion and there was no agreement to repair or to deliver the premises in good condition at the end of the term, the lessor cannot recover damages without proving that defendant was negligent. The fact of the explosion is not sufficient.

APPEAL from judgment of Court of Common Pleas, Lehigh County, in favor of defendants in action by plaintiff for damages to buildings by an explosion on premises leased to defendants.

JOHN RUPP, A. N. ULRICH and EDWARD HARVEY, for appellant.

MILTON C. HENNINGER and ROBERT E. WRIGHT, for appellees.

Generally, in the absence of an express covenant on the subject, the law implies a covenant on the part of the lessee so to treat the demised premises that they may revert to the lessor unimpaired, except by usual wear and tear, and uninjured by any wilful or negligent act of the lessee. The implied covenant does not, however, extend to the loss of buildings by fire, flood, or tempest or enemies which it was not in the power of the lessee to prevent, and there is no implied covenant that the lessee shall restore buildings which have been destroyed by accident, without fault on his part. *Long v. Fitzsimmons*, 1 Watts & S. 530; *U. S. v. Bostwick*, 94 U. S. 53. Tenants by the curtesy and in dower were responsible at common law, and tenants for life and for years whose estates were created by the acts of the parties were responsible under statute as for permissive waste until relieved by the statute of 6 Anne, c. 31, where the property was destroyed by unavoidable accident, not the act of God or the public enemy. The statute of 6 Anne, c. 31, which saved the tenant from liability for the consequences of accidental fires, has never been in force in this State, and it has been formally adopted by few, if any, of the other States except New Jersey. In *U. S. v. Bostwick*, *supra*, it was held that the implied covenant of the tenant is not to repair generally, but so to use the property as to make repairs unnecessary as far as possible, and that it is a covenant against voluntary waste only. It is said in the opinion by Waite,

C. J., "It has never been so construed as to make a tenant answerable for accidental damages nor to bind him to rebuild if the buildings are burned down, or otherwise destroyed by accident." The statement in the opinion in *Long v. Fitzsimmons*, *supra*, that a tenant, where there is no covenant to that effect, is not bound to restore buildings that have been burned down, or become ruinous by other accident, without default on his part, may be a dictum only, but it is in harmony with the trend of decisions of the courts of other States, and of the federal courts, and it has been accepted and acted upon by the courts of this State, and it is a correct statement of the law. There could be no recovery without proof of the defendant's negligence, and the burden of proof rested upon the plaintiff. The lease was in parol, for one year, with no agreement to repair or to deliver the premises in good order and condition at the end of the term. No new or different use was made of the building by the tenants. It was used by them for the purpose for which it had been leased, and for which it had been fitted with machinery, and used by the lessor. The only new appliance used was the rendering tank which exploded. In the use of the property leased, the defendants were under an implied covenant not to negligently injure it. The standard of their duty was reasonable care. The mere fact of the explosion did not throw upon them the burden of proving that they were not negligent. The burden of proof was with the plaintiff throughout the trial. He was not bound in the first instance, to prove more than enough to raise a presumption of negligence on the part of the defendants. Proof of the explosion and of the attendant circumstances might have furnished sufficient ground for a reasonable inference of negligence to have made out a *prima facie* case, but he could not rest his case upon a bare presumption, based only upon the fact that the explosion occurred.

Judgment affirmed.

Opinion by FELL, J.

BRASHEAR v. PHILADELPHIA TRACTION COMPANY.

Supreme Court, Pennsylvania, March, 1897.

INJURY TO PASSENGER BOARDING STREET CAR—LOCKJAW PROXIMATE CAUSE.—Where the plaintiff's wife was injured by the sudden starting of a street car as she was boarding it, and symptoms of premature

childbirth followed, and childbirth occurred a few days later, followed by tetanus which caused her death, the question whether the injuries were the proximate cause of her death were properly left to the jury.

APPEAL from judgment, Court of Common Pleas, Philadelphia County, in favor of plaintiff.

J. HOWARD GENDELL, for appellant.

J. W. GOHEEN, for appellee.

FELL, J.—Whether the injuries to the plaintiff's wife, caused by the sudden starting of the car as she was in the act of getting on the rear platform, were the proximate cause of her death, was clearly a question for the jury. She felt at once the physical effect of her injuries, followed the next day by symptoms of premature childbirth, which occurred a few days later, and was followed by tetanus which caused her death. The medical testimony agreed that, while tetanus resulting from childbirth is comparatively rare, there is a distinct relation between it and childbirth, especially miscarriage, and that it is one of the natural and probable consequences to be apprehended. There was no evidence which would have justified the court in saying that there was an intervening independent cause.

The parts of the charge assigned for error should be considered in their connection as they appear in the charge, and not as separated and transposed in the assignments. So considered, they are free from error. It did appear from the evidence that death was caused by lockjaw, which resulted from premature birth, and the case was tried by both sides on that theory. The causal connection was shown, and the continuity of effect was traced through the succession of events. No other cause of death was assigned. True, it was shown that the disease was caused by specific infection, but by the same witnesses it was shown that the miscarriage made the deceased especially liable to infection. The statements in the charge rest upon the uncontradicted testimony in the case and seem to be fully warranted by it.

Judgment affirmed.

MACK v. WRIGHT.

Supreme Court, Pennsylvania, March, 1897.

WORKMAN FALLING THROUGH UNCOVERED RAFTERS OF BUILDING—STATUTORY PENALTY.—An action for damages for the death of a workman caused by his falling through the rafters of a building, the joists of the floors of which were not covered, is not maintainable, under a statute

which provides that persons having charge of the construction of a building shall cover the joists of each floor above the third story so as to protect the workmen from falling through, and for a violation thereof imposes the penalty of a fine only.

APPEAL from judgment of nonsuit, Court of Common Pleas, Allegheny county, in action by plaintiff for damages for the death of her husband who was at work on the roof of a building being erected by the defendants, when a board that he was sawing fell through the rafters, carrying deceased with it into the cellar.

JAMES FITZSIMMONS, for appellant.

STONE & POTTER, for appellees.

The plaintiff rests her case upon the act of May 11, 1893, which declares that "it shall be the duty of the party or parties having charge of the construction of any new building hereafter erected in this commonwealth, to have the joists or girders of each floor above the third story covered with rough scaffold boards or other suitable material, as the building progresses, so as to sufficiently protect the workmen either from falling through such joists or girders, or to protect the workmen or others who may be under or below such floor from falling bricks, tools, mortar or other substance whereby accidents happen, injuries occur and life and limb are endangered." In the second section of the act it is provided that for any violation of it "a penalty not exceeding one hundred dollars for each floor of joists or girders left uncovered shall be imposed, to be collected as fines and penalties are usually collected." It does not expressly give a right of action for an injury attributable to the non-performance of the duty prescribed, nor declare that the failure to comply with its provisions shall be taken to be negligence *per se*. In this respect it differs materially from the statutes which prescribe regulations for the protection of the workmen in the coal mines of the commonwealth. These statutes create new duties and impose penalties for the non-performance of them. In addition to the penalties imposed for non-performance, they expressly give to the party injured by it a right of action against the party at fault for the direct damage caused thereby, and, in case of his death by reason of such non-performance, they give to his widow and lineal heirs a right of action "for like recovery of damages for the injury they have sustained." The inference is, that if the legislature had intended that, in addition to the penalty imposed by the statute under consideration for the non-performance of the duty prescribed by it, a party injured by such non-performance should have an action for the damages sustained thereby, it would have said so. The presumption is that, where a statute imposes a duty where none existed before, the remedy

provided therein for the breach of the duty is exclusive. It is practically conceded by the learned counsel for the appellant that but for the act of 1893 the nonsuit was properly entered. There is nothing in the evidence to charge the defendants with negligence aside from their failure to comply with the statute in regard to covering the joists or girders, and this is not shown to have been the proximate cause of the accident.

Judgment affirmed.

Opinion by McCOLLUM, J.

PARKER v. SOUTH CAROLINA AND GEORGIA RAILWAY COMPANY.

Supreme Court, South Carolina, March, 1897.

DAMAGES — INSTRUCTION.— In an action for personal injuries an instruction that in estimating damages the jury might "take into consideration the doctor's bill," where plaintiff was liable for it, was not error.

ACTION BY EMPLOYEE — BURDEN OF PROOF — INSTRUCTION.—

Where it did not appear that plaintiff claimed any presumption of negligence from the fact of the accident or the injury sustained, it was not error to refuse to give a specific instruction that the burden of proof was on plaintiff to prove defendant's negligence, where the court instructed the jury upon the rule as to actions brought by employees requiring the latter to make out a case by a preponderance of the evidence.

APPEAL by defendant from judgment for \$2,500, rendered for plaintiff in the Common Pleas Circuit Court, Edgefield County. Exceptions by defendant (1).

1. Defendant appealed to the Supreme Court on the following exceptions:

"First. That his honor, Judge Gary, erred, it is respectfully submitted, in granting his order of February 21, 1896, in which, among other things, he directed 'that the defendant, the South Carolina & Georgia Railroad Company, do give to the plaintiff, J. R. Parker, or his attorneys, within ten days from this date, an inspection and a copy, or permit the said J. R. Parker, or his attorney, to take a copy of any books, papers, or documents in the possession or control of the said South Carolina &

Georgia Railroad Company containing any evidence relating to a lease or any agreement by or under which they may have operated the Carolina, Cumberland Gap & Chicago Railroad on or prior to the month of June, 1895,' in that it is respectfully submitted that upon the facts before his honor at the time, there was no foundation in the law for said order. Second. That his honor, Judge Gary, at the trial of the case, in his charge to the jury, erred in charging them, among other things, as follows: That in estimating the damages you are at liberty 'to take into consideration the doctor's bill,'—

JOSEPH W. BARNWELL, HENDERSON BROS. and W. G. EVANS, for appellant.

CROFT & TILLMAN and SHEPPARD BROS., for respondent.

It seems that the disaster which occasioned the injuries of which plaintiff complained occurred on the line of the Carolina, Cumberland Gap & Chicago Railway Company on June 25, 1895, at which

in that it is submitted that there was no testimony in the case which warranted said charge, the testimony plainly showing that Parker had never incurred or paid a doctor's bill, but that, to the contrary, the doctors who attended him were employed by the railroad company, and looked to the railroad company for pay. Third. That his honor erred in not charging the defendant's second request to charge as follows: 'In this charge of negligence brought by the plaintiff against the defendant, the burden of proof of establishing the negligence is upon the plaintiff, and no presumption of negligence arises from the mere fact that the engine jumped from the track, or that the plaintiff was injured. In cases between passengers and a railroad company, when there is an accident, ordinarily there is a presumption of negligence; but in cases between the employees or servants of the railroad company and such railroad no such presumption arises from the occurrence of the accident which caused the injury complained of, and the burden is upon the plaintiff to satisfy the jury that there was negligence,'—in that it is submitted that said request to charge is in accordance to law. Fourth. That his honor erred in not charging the defendant's third request to charge, as follows: 'That as between passengers and a railroad company, when an injury has happened, the measure of care is extraordinary care, and the company is held liable for the slightest negligence, but not so as between employees (as in this case) and the railroad company, where the measure is only the exercise of ordi-

nary care and diligence,'—in that it is submitted that the said request is in accordance with the law. Fifth. That his honor erred in not charging the defendant's fifth request to charge, as follows: 'In a case like the present one the proper inquiry is not whether the accident might have been avoided if the company had anticipated its occurrence, but whether, taking the circumstances as they then existed, the company was negligent in failing to anticipate and provide against the occurrence. The duty imposed does not require the use of every possible precaution to avoid injury, nor that the company should have employed any particular means which it may appear, after the accident, would have avoided it. It was only required to use such reasonable precautions to prevent accidents as would have been adopted by prudent persons prior to the accident,'—in that it is submitted that said request is in accordance with the law. Sixth. That his honor erred in not charging and refusing to charge the eighth request of the defendant, as follows: 'The jury is further charged that the plaintiff must introduce evidence to show that the injury is more naturally to be attributed to the negligence of the defendant than any other cause, or he cannot recover. If the accident appears, upon the evidence, to be as consistent with the absence of negligence for which the defendant is responsible as with the existence of such negligence, the plaintiff must fail, and the verdict must be for the defendant,'—in that it is submitted that said request is in accordance with the law.

time, as plaintiff alleged, the defendant company was operating the said Carolina, Cumberland Gap & Chicago Railway under a lease or agreement executed by the receiver of said last-mentioned railway company. This allegation it became necessary for plaintiff to prove under the general denial in defendant's answer; and, as such alleged lease was not on record in any of the offices in which such a paper was required to be recorded, plaintiff gave due notice of a motion, based upon affidavits, for an order requiring the defendant company to deliver to plaintiff a copy of the agreement under which the defendant company was operating the Carolina, Cumberland Gap & Chicago Railway during the month of June, 1895. This motion was heard by Judge Gary, who, on February 21, 1896, granted the order to which error is imputed by the first exception upon the ground that "upon the facts before his honor at the time there was no foundation in law for said order." It will be observed that there is no particular specification of error in the exception, and hence it might possibly be disregarded as too general to require its

Seventh. That his honor erred in not charging the tenth request of the defendant, as follows: 'An employee of a railroad company, in entering into the service thereof, knows, or is taken to know, that there are extraordinary dangers inseparable from such a service which human care and foresight cannot always guard against. He is not bound to incur these unknown perils, incident to the service, and may refuse to do so; or he may, as far as can be done, provide for them, in the rate of compensation or otherwise. But if he voluntarily engages to serve in view of all the hazards to which he will be exposed, it is well settled that, as between him and his employer, he undertakes to run all of the ordinary risks of the service; and this includes the risk of the injuries which may arise from an unexpected cause, and which could not be guarded against by the exercise of ordinary care and diligence. And if the jury in this case find from the evidence that the plaintiff was injured by such an accident, arising from an unexpected cause, which could not be guarded against by the exercise of ordinary care and dili-

gence, he cannot recover,'— which request to charge, we submit, is in accordance with the law. Eighth. That his honor erred in not charging the defendant's thirteenth request as follows: 'That an employee who works defective machinery, knowing the defect, assumes the risk, and, if injured from such defect, cannot recover, even if his employer knows it. In order to shift the responsibility to the employer, he must have promised to repair. In this case the jury is charged that if, in February, 1895, Parker delivered the engine No. 6 to Blackwood, the repairing agent of the defendant, and they find he promised to repair it, as to the parts claimed to be out of repair, and dangerous, yet, if they further find that he did not do so, and Parker again accepted said engine, and in a dangerous condition, known to him, ran it from time to time until June 25, 1895, and that from such condition of said engine he was then injured, he cannot recover, no matter how many times he again notified the agents of the company, unless they again promise to repair.'"

consideration. But, waiving this, we learn from the argument that the specific error complained of is that the object of the motion was to obtain a copy, or inspection, of a document which plaintiff desired to use in making out his own case, and not of a document which defendant proposed to use in making out its defense; and that this court has decided in two cases — *Cartee v. Spence*, 24 S. C. 558, and in *Jenkins v. Bennett*, 40 S. C. 400, 18 S. E. 929 — that such is not the object of section 389 of the Code, under which the motion was made. An examination of those cases, however, will show that no such point was decided in either of those cases. While it is true that in *Cartee v. Spence* an intimation was thrown out as to the effect claimed by counsel for appellant, yet the court distinctly declined to decide the point, and rested its decision expressly upon another ground. So, in *Jenkins v. Bennett*, the court, in terms, declined to solve the doubt suggested in *Cartee v. Spence*, resting its decision upon another ground. Neither do we think it necessary now to decide what is the proper construction of section 389 of the Code, for the reason that the order to which exception is taken amounted practically to nothing. Copies or inspection of the papers desired were not obtained under that order, and therefore appellant suffered no injury from it. The evidence that the defendant company was operating the Carolina, Cumberland Gap & Chicago Railway at the time of the accident seems to have been obtained another way, — apparently in the mode suggested in *Cartee v. Spence* — and, so far as it appears, no exception is taken to such evidence. Even if the order was erroneously granted, it was a harmless error.

The second exception is based upon the unfounded assumption that Drs. Hill and Tompkins were employed by the defendant company to attend plaintiff, and that such company, and not plaintiff, was liable to those doctors for their medical attention. There is nothing in the testimony to sustain such an assumption. Neither of the doctors, in their testimony, say that they were employed by the defendant company, or that they looked to it for payment of their bill. The fact that defendant company, after the accident had occurred, — how soon after does not appear, — gave Messrs. Hill and Tompkins notice that an accident had occurred, in which plaintiff was injured, is very far from showing that the company had employed these doctors to attend plaintiff, or that it would be responsible for their bill. That notice was, manifestly, given in obedience to section 1690, Rev. St. 1893, in order to escape the penalty therein provided for. Indeed, the testimony shows that Messrs. Hill and Tompkins had already taken charge of the case, and were rendering their medical services to the plaintiff, presumably with his consent,

before the notice was given to Messrs. Hill and Tompkins; and this would raise a liability on the part of plaintiff to pay for such services. The fact that the plaintiff had not paid the medical bill at the time of the trial amounts to nothing. If he was liable for it, as he unquestionably was, the circuit judge was clearly right in instructing the jury that, in estimating the damages sustained by plaintiff, they might take into consideration the amount of the doctors' bill. Exception overruled.

The third exception cannot be sustained. Inasmuch as the circuit judge had, in his general charge, instructed the jury that the rule was different in a case brought by a passenger from that in which the action is brought by an employee, and that in the latter case plaintiff must make out a case of negligence by the preponderance of the evidence, it seems to us that the proposition of law upon which the second request is based has been already charged, and need not have been repeated, as demanded by this request. The point seems to be that there is error in not saying to the jury that in a case like this there was no presumption of negligence, as there would be in a case brought by a passenger, but that the burden of proof was upon plaintiff to show negligence on the part of the defendant company. We see nothing in the case which called for any such specific instruction. It does not appear that plaintiff claimed that there was any presumption of negligence. And, if there had been, the judge's instruction to the jury held plaintiff to the duty of showing by the preponderance of the evidence that the disaster was caused by the negligence of defendant; and this was only another way of saying that the burden of proof was on plaintiff to show negligence on the part of defendant.

The fourth exception is overruled for the same reason. The jury had already been charged as to the difference in the degree of care required in case of a passenger and in a case brought by an employee, and there was no error in omitting to repeat that instruction.

The fifth, sixth, and seventh exceptions cannot be sustained, for the reason that the propositions of law upon which the requests therein referred to are based were sufficiently covered by the charge of the circuit judge, and there was no error on his part in refusing to repeat those propositions in the language in which appellant saw fit to present these requests.

It only remains to consider the eighth exception, which must also be overruled. The law in reference to the case of an employee who uses defective machinery or appliances after knowledge of such defects was fully and correctly stated by the circuit judge, and there was no error in refusing to charge defendant's thirteenth request.

Such an instruction as was there requested would have been an invasion of the province of the jury. *Lasure v. Manufacturing Co.*, 18 S. C. 281.

Judgment affirmed.

Opinion by McIVER, Ch. J.

WYLIE ET AL. V. OHIO RIVER AND CHARLESTON RAILROAD COMPANY OF SOUTH CAROLINA.

Supreme Court, South Carolina, March, 1897

COW KILLED ON TRACK — EVIDENCE.— In an action to recover for negligent killing of a cow by defendant's train, an exception as to sufficiency of the evidence will not be considered in a case at law.

MORTGAGOR AND MORTGAGEE — DAMAGES.— A mortgagee, as legal owner, may bring action for damages for injury to the mortgaged property, and the measure of damages is the value of the mortgaged property, not what the mortgagor might owe the mortgagee on the mortgage debt.

APPEAL from judgment for plaintiff rendered in the Common Pleas Circuit Court, Lancaster County.

N. W. NARDIN and R. E. & R. B. ALLISON, for appellant.

R. E. WYLIE, for respondents.

JONES, J.— This is an appeal from the judgment of the Circuit Court affirming the judgment of a Magistrate's Court in an action for damages for the negligent killing of a cow. John D. Wylie at his death, May 15, 1894, held a chattel mortgage, dated December 28, 1893, executed by Wyatt Fraser to secure a note for \$50, payable November 1, 1894, the mortgage covering the cow and some other personal property. Some time in December, 1894, after the maturity of the mortgage debt, while in the possession of the mortgagor, the cow was run over and killed by the defendant's train. This action was brought to recover \$50 damages. The defendant denied the negligent killing, and set up that plaintiffs had no title or interest in the cow and no right of action for damages. A trial by jury having been waived, Magistrate W. P. Caskey, after hearing the evidence, gave judgment for the plaintiffs for \$25, which judgment, on appeal to the Circuit Court, was affirmed.

The first and second exceptions raise the question that the magistrate had no jurisdiction under the Constitution to try the case. These exceptions were not discussed by appellant, doubtless because the question raised has been finally settled in the recent cases of *In re Hooper* (S. C.) 26 S. E. Rep. 466, and *Delk v. Zorn*, Id.

The third exception complains that there was no evidence of negligence to warrant the judgment below. This relates to the sufficiency of the evidence, which we have so often declared this court cannot consider in a case at law.

The fourth exception alleges error "because the plaintiffs had no title to the cow when she was killed, and they were not the real parties in interest." It is well settled that upon breach of the condition of a chattel mortgage the mortgagee becomes the legal owner of the mortgaged property. It follows that the mortgagee, as legal owner, may bring action for damages for injury to the mortgaged property. This case does not differ in principle from the case of *Williams v. Dobson*, 26 S. C. 110, 1 S. E. Rep. 421, wherein an execution creditor and a constable were held liable to the mortgagee in damages for seizing and selling under execution the mortgaged property, while in the possession of the mortgagor after condition broken. It does not affect the question that the mortgagees had not taken possession of the mortgaged property. The rights incident to legal ownership attached on the breach of the condition of the chattel mortgage.

The fifth exception alleges, further, as error: "Because the mortgagor had still possession of all the other items of personalty mentioned in the mortgage, which were more than sufficient to pay off the said mortgage debt, and the plaintiffs had taken no steps to gain possession thereof." It does not concern this case that there was other property which plaintiffs had the right to take possession of as legal owners. This is an action at law for damages to plaintiffs' property. The measure of damages is the value of the mortgaged property, not what the mortgagors might owe the mortgagees on the mortgage debt, in an accounting between them. The court below did not have the power in this action to determine the equities between the mortgagor and mortgagees, so as to show that plaintiffs had not been damaged, because the remaining property is sufficient to pay the mortgage debt. But, if the court could have done so, there was no evidence whatever as to the value of the remaining property.

The judgment of the Circuit Court is affirmed.

JEFFERSON COUNTY SAVINGS BANK v. COMMERCIAL NATIONAL BANK.

Supreme Court, Tennessee, March, 1897.

BANKS — COLLECTION — CUSTOM.— A principal who selects a bank as his collecting agent, thus availing himself of the facilities which it holds out, in the absence of special directions, is bound by any reasonable usage prevailing and established among the banks at the place where the collection is made, without regard to his knowledge, or want of knowledge, of its existence.

APPEAL by defendant from Chancery Court, Davidson County.

CHAMPION, HEAD & Brown, for appellant.

STEGE, WASHINGTON & JACKSON, for appellee.

BEARD, J.— This cause was tried upon a statement of agreed facts. Those essential to its present determination are as follows, to wit: The complainant and defendant were corporations engaged in general banking operations,— the one in Birmingham, Ala., and the other in Nashville, in this State. They were at the time of the transaction out of which this controversy arose, and had been for a considerable period antecedent, engaged in a mutual correspondence, as the exigencies of their business required or suggested. In the course of this correspondence, the complainant bank, as owner and holder, forwarded to the defendant bank, for collection, a note for \$940, drawn by Loventhal & Son to the order of and indorsed by J. C. Marks & Co., and also a draft for \$1,352, drawn by J. C. Marks & Co., and accepted by Sulzbacker Bros., both due and payable on Saturday, June 20, 1891. At 2 P. M. of the day of its maturity, the maker of the note and the acceptor of the draft tendered in payment thereof, to the teller of the Commercial National, their checks for the respective amounts due thereon, drawn on and properly certified by the Nashville Savings Bank (a banking corporation of good standing in Nashville); and these checks were accepted by this officer of the defendant, and the note and draft, after being stamped "Paid," were delivered into the hands of the parties respectively entitled to them. This was done in accordance with a well established usage or custom of the various banks of Nashville. The checks thus received were carried over to Monday, June 22d, on which day, at the hour of 11 A. M., they were presented to the Nashville Savings Bank for payment, this being the day and the hour, according to the custom and usage of the banks

of Nashville, for their presentment. These checks were left with the Nashville Savings Bank for examination, according to another custom or usage of these banks, and at 2 P. M. of June 22d they were returned unpaid to the defendant bank. At that hour the Nashville Savings Bank closed its doors, and the Commercial National Bank at once caused the checks to be presented and protested for nonpayment. It is agreed that the Jefferson County Savings Bank had no knowledge of any of these local customs or usages of the banks of Nashville, and was ignorant of the methods pursued by the defendant bank in regard to this paper, until informed thereof by subsequent correspondence. Efforts made to collect the amount of these checks out of the drawers having proved abortive, the result is that the draft and note have been wholly lost to their owner. The bill in this cause seeks a decree against the Commercial National Bank covering this loss, upon the ground that it had no right, in the absence of express authority, to receive, in payment of this paper, anything but money, and that it cannot excuse itself from liability for doing otherwise, by setting up a local custom or usage of which the complainant was wholly ignorant. The Court of Chancery Appeals held to this view, and accordingly entered a decree in favor of complainant for the full amount of the note and draft, with interest added.

In this decree there was error. The rule which that court invokes as decisive of this case — that is, that an agent, in the want of express authority, cannot accept anything in discharge of the principal's debt except money — is well settled, and has been frequently announced in such cases as *Walker v. Walker*, 5 Heisk. 425, but it does not control in a case like the present. A principal who selects a bank as his collecting agent, thus availing himself of the facilities which it holds out, in the absence of special directions, is bound by any reasonable usage prevailing and established among the banks at the place where the collection is made, without regard to his knowledge or want of knowledge of its existence. *Sahlien v. Bank*, 90 Tenn. 221, 16 S. W. Rep. 373; *Howard v. Walker*, 92 Tenn. 452, 21 S. W. Rep. 897.

The usages which were observed in the unsuccessful effort to collect the paper in controversy, and which are shown to have been established among the banks of Nashville, we find were reasonable and proper. It follows that the complainant was conclusively affected by them, although actually ignorant of their existence. The decree of the Court of Chancery Appeals is reversed, and the bill is dismissed.

CITY OF DALLAS v. McALLISTER.

Court of Civil Appeals, Texas, February, 1897.

WAGON INJURED BY CAVING IN OF SEWER — NOTICE OF DEFECT.—

Where a wagon and its contents were damaged by reason of the caving in of a street sewer, which dangerous condition had existed for about two months, the city was held liable, and the statutory requirement of special notice to city officers of the defect had no application, the nature of the cavity and the length of time it had existed charging the city with notice of its existence.

APPEAL from Dallas County Court. The facts appear in the opinion.

A. P. WOZENCRAFT and T. A. WORK, for appellant.

MORRIS & CROW, for appellee.

JAMES, J.—It appears from the testimony that a sewer on one of the principal streets of Dallas had caved in, leaving a dangerous depression up and down the street, ten or twelve feet long. It had been there about two months. The driver of plaintiff's wagon, in going around the place, had occasion to cross the street about fifteen or twenty feet above it, where the street appeared to be solid, when the sewer caved in under the wagon and team, causing the injuries to the wagon, one mule, and the contents of the wagon, for which the plaintiff recovered in this suit.

The charter of the city provided that no suit for damages should be sustained against the city for injuries caused from streets, sewers, etc., being out of repair from the gross negligence of the city, unless the same had remained so for ten days after special notice in writing given to the mayor or city engineer; and it was proved that no actual notice had been given the officers of the city concerning this cave in the street. This charter provision has been construed by the Supreme Court of this State, in *Peacock v. City of Dallas* (Tex. Sup.) 35 S. W. Rep. 8; and our reading of the opinion in that case leads us to conclude that the court did not err in holding that the provision referred to had no application.

It is contended also that as the city officers had no notice of the defect at the point of the accident, where there was no sign of it on the surface, the city cannot be held liable for the injury. Knowledge or circumstances that impute knowledge of an existing defect, and a reasonable time to repair, are essential prerequisites to a city's liability.

The court did not err in holding that from the nature of the original cavity, and the length of time it had been there, the officers of the city were charged with notice of its existence. This

constructive notice would necessarily be extended to include what reasonable diligence in remedying the defect would have revealed. If there were nothing in the testimony tending to show a connection between the original break and the one through which the injury occurred, in such manner as to indicate that in repairing the former the cause of the latter would have become known, then, we think, the city would not be held liable. The evidence, however, shows that the entire sewer was defective and dangerous from the place of the accident down to the original caving in, a distance of fifteen or twenty feet, for it is testified to that, when the wagon went down, the ground caved all the way down to the other cavity. It is therefore a reasonable inference that the sewer was in an unsafe condition all the way down, and that notice of this would have followed ordinary care in repairing the first break; hence the city must be taken to have had knowledge of it, and be chargeable with the consequences. Under the circumstances, it may be stated that the injury in question was the proximate result of the city's negligence in failing to repair the original break. The court found that plaintiff's driver was not negligent, and found practically the conclusions that are above stated, and we think the judgment should be affirmed.

CITIZENS' RAILWAY COMPANY v. MADDEN.

Court of Civil Appeals, Texas, February, 1897.

PRACTICE — APPEAL.— Where transcript of appeal from Justice's Court was filed within the statutory period of ten days from rendition of judgment, but the justice of the peace filed the same in the County Court on the third instead of the first day of the second term, it was error to dismiss appeal on the ground of failure of appellant to apply for a mandamus, as such proceeding could not have procured filing of transcript at an earlier date, and such failure to resort to mandamus was not negligence.

APPEAL from McLennan County Court.

CLARK & BOLINGER, for appellant.

Appellee, on October 19, 1894, sued appellant, a private corporation operating a street railway in the city of Waco, for \$175, actual damages for negligently killing a dog belonging to said appellee, said suit being filed in the Justice's Court of precinct No. 1, McLennan county, Tex. Appellant pleaded a general demurrer, general denial, and specially that appellee was guilty of contributory negligence. Said cause was tried by a jury on September 25, 1895, and verdict and judgment rendered for appellee for the sum of \$53. On October 1, 1895, appellant duly filed its appeal bond in said Justice's

Court, which said bond was duly approved and filed on said October 1, 1895, by J. B. Earle, Justice of the Peace, precinct No. 1, McLennan county, Tex. On March 26, 1896, appellee filed motion to dismiss the appeal in the above cause in the County Court, because the record in said cause was not transmitted to the County Court until January 9, 1896. Appellant answered said motion by stating that it had duly perfected its appeal by filing appeal bond within ten days after the rendition of said judgment in the Justice's Court, as required by law, and that the transcript and record were filed by the justice on January 9, 1896, at the second term after the perfection of the appeal, and long before any motion to dismiss said appeal had been filed. On April 17, 1896, in the County Court of McLennan county, Tex., motion of appellee to dismiss the appeal was sustained by the court. Said cause was duly dismissed, and judgment ordered to be certified to the justice of the peace from which said cause was appealed.

The court below evidently dismissed this case for the reason that the transcript from the Justice's Court was not filed in the court below within the time required by law. The statute requires the appeal to be perfected from the judgment of the Justice's Court by executing the bond within ten days after judgment, which appears to have been done in this case. The statute also requires that the transcript from the Justice's Court shall be filed in the County Court at the first term, but, if there be not time to make out and transmit the same to that term, the transcript may be transmitted and filed before the first day of the second term of the County Court. The transcript in this case was not sent up at the first term, and was not filed in the County Court until the third day of the second term. Under this statute, the appellant has until the first day of the second term of the County Court in which to file its transcript in that court, and the justice of the peace could not, under the law, be required to transmit the papers to that court before the first day of the second term. It does not appear from the record that the appellant could have availed itself of the remedy by mandamus prior to the time in which, under the law, the justice of the peace was required to send up the transcript. It is true, upon failure to file the transcript on the first day of the succeeding term of the County Court, the appellant could have immediately applied for, and doubtless obtained, a writ of mandamus against the justice of the peace, requiring him to transmit to the County Court the transcript; and if, in obedience to this mandate, the justice of the peace had complied with the order, and sent up the transcript, it would have been held to have been filed in time, although actually filed in the County Court after the first day of such

succeeding term. In the nature of things, it is not reasonable to suppose that the appellant could have, by mandamus, procured the transmission and filing of the transcript in the County Court at an earlier day than was actually accomplished. Consequently, the failure to resort to mandamus could not be held, under the circumstances, negligence; and filing the transcript, under the circumstances as shown to exist in this case, was within time.

Judgment reversed.

Opinion by FISHER, C. J.

TEXAS AND PACIFIC RAILWAY COMPANY v. STAGGS, ET AL.

Supreme Court, Texas, March, 1897.

KILLED ON TRACK — INSTRUCTION — CONTRIBUTORY NEGLIGENCE.— In an action to recover for negligent killing of person while walking upon railroad track, it was error to charge that, notwithstanding negligence on part of deceased, his widow and children could recover damages, if the defendant's servants after discovering him upon the track, between a quarter and a half-mile in front of the train, failed to use ordinary care to prevent or lessen injury when he was in actual danger.

CERTIFICATE of dissent from Court of Civil Appeals, Second Supreme Judicial District. From judgment for plaintiffs, defendant appealed to Court of Civil Appeals (reported in 37 S. W. Rep. 609).

STANLEY, SPOONTS & THOMPSON, for appellant.

R. L. CARLOCK and J. E. MARTIN, for appellees.

The following is the certificate of dissent: "Assuming that J. W. Staggs was guilty of contributory negligence when run upon and killed by appellant's engine and train, was it or not correct for the court to charge the jury, in effect, that the widow and children of deceased would be entitled to recover, notwithstanding such negligence, if the train operatives, after discovering Staggs upon the track, between a quarter and a half mile in front of the moving train, failed to use the care of a person of ordinary prudence to discover, in time to prevent or lessen the injury, when he was in actual danger, and that he would not probably leave the track in time to prevent injury; as will more fully appear from the majority and dissenting opinions?" From the question certified and the opinions referred to we understand that the deceased was upon appellant's track, with a train approaching from behind him, under such circumstances as made him chargeable with contributory negligence in not discovering the approaching train, and in not leaving the track. The persons who

were operating the train saw the deceased upon the track when he was between a quarter and a half mile in front of the train, after which the employees of appellant failed to use ordinary care to discover that the deceased would not leave the track in time to prevent injury to him, and did not discover his peril when it arose in time to stop or slacken the speed of the train so as to prevent or lessen the injury. The district judge at the trial charged the jury, in effect, that the widow and children were entitled to recover under such state of facts, and the question of law submitted for our consideration is, Did the district court commit error against the appellant in giving that charge? The question presented by the certificate was decided by this court in the case of *Railway Co. v. Breadow* (Tex. Sup.), 36 S. W. 410 (1). If the deceased was not guilty of negligence in being or remaining upon the track of defendant's railroad, and if the employees of the railroad company failed to use such care as a person of ordinary prudence would have exercised under like conditions to discover his presence upon the track, the widow and children of the deceased would be entitled to recover for his death if caused by such negligence of the railroad company. If deceased was guilty of contributory negligence, his widow and children could not recover for

1. In citing *Railway Co. v. Breadow* (Tex. Sup.) 36 S. W. Rep. 410, the court said: "In that case the proof showed that the engineer in charge of the locomotive saw the deceased near the track, some distance ahead, but the evidence did not show that the engineer saw him at any time when he was in a position of danger; and this court, through Justice Denman, said: 'If defendant, through the parties in charge of the engine, knew of Breadow's peril in time to have avoided same, such knowledge imposed upon it the new duty of using every means then within its power consistent with the safety of the engine, to avoid running him down; and a failure so to do would render it liable, notwithstanding he may have been guilty of contributory negligence in being exposed to the peril. This new duty and liability for its breach is imposed, upon principles of humanity and public policy, to prevent what would otherwise be, as far as civil liability is concerned, the licensed destruction of persons negli-

gently exposing themselves to peril. The same principle of law which, on grounds of public policy, will not permit a person to recover when his own negligence has proximately contributed to the injury, will not permit the party who has inflicted the injury in violation of such new duty to defend upon the ground of such negligence. The principle, however, has no application, in the absence of actual knowledge on the part of the person inflicting the injury of the peril of the party injured in time to avoid the injury by the use of the means and agencies then at hand. If he had no such knowledge, the new duty was not imposed, though it be clear that by the exercise of reasonable care he might have acquired the same. The burden of proof was upon plaintiff in this case, in order to recover for a breach of such new duty, to establish, not that the employees might, in the exercise of reasonable care, have acquired such knowledge, but that they actually possessed it.'"

failure to see him upon the track, or to discover his danger, because in such case their right of action would rest upon the negligence of the defendant, to which contributory negligence of the deceased would constitute a good defense. If the deceased was negligent to that degree denominated contributory negligence, but the employees of the railroad company actually knew of his danger in time to have averted it, and they failed to use every means in their power consistent with safety to prevent the injury, the railroad company would be liable notwithstanding the negligence of the deceased. The law embodies the principles of humanity and public policy into that salutary rule which, applied to the facts of this case, required of the engineer, when he discovered the peril of deceased, if it was discovered, to use every means in his power, consistent with safety, to prevent the injury. To an action for a failure to perform this duty, contributory negligence is no defense. The District Court erred in charging the jury as stated in the question.

Reversal sustained.

Opinion by BROWN, J.

IRON CITY NATIONAL BANK OF LLANO v. PEYTON ET AL.

Court of Civil Appeals, Texas, January, 1897.

FORGED CHECK — EXPERT TESTIMONY.—In an action to recover the amount of a forged check it was not error to admit expert testimony as to dissimilarity of signature on forged and genuine check, although such checks had been offered in evidence and submitted to jury for their inspection, as the forgery being admitted the question was whether there was negligence in detecting the forgery.

APPEAL by plaintiff from judgment rendered for defendant in the Bell County Court.

LAUDERDALE & LINDEN, for appellant.

FELIX HUMPHRIES, for appellee.

Appellant's statement of facts adopted by the court is as follows:

"Appellant, Iron City National Bank of Llano, instituted this suit against Peyton & Co., a firm composed of Lee Payton and Chas. B. Smith, doing business in Belton, Texas, under the firm name and style of Peyton & Co., to recover of them the sum of \$110.45, same being the amount of a forged check drawn against appellant bank by one J. A. Crownover, who forged thereto the name of W. P. Crownover, a customer and depositor of appellant bank, and delivered to appellee in payment of the purchase-price of certain

goods sold and delivered by appellee to said J. A. Crownover, the forger. Said check was indorsed by defendants, and on the 27th day of April, 1895, was presented for payment by the American National Bank of Austin, and paid by appellant without its discovering the forgery. A trial of the cause had in the Justice Court of Precinct No. 1, Bell county, Texas, on the 29th day of August, 1895, resulted in a judgment for appellees, Peyton & Co., from which appellant bank appealed to the County Court of Bell county, Texas, and on the 10th day of December, 1895, the cause was tried by a jury in said court, and resulted in a verdict and judgment for defendant firm, and, plaintiff's motion for a new trial having been overruled, it has duly prosecuted its appeal to this court."

On the trial the court, after stating the issues, instructed the jury as follows: "If a person have notice of any fact, he is charged and held liable to the same consequences he would be if he had actual knowledge of such fact. A person has notice of a fact—of every fact—when he knows of the existence of any other fact or facts which to him suggests, or which to a person of ordinary prudence and intelligence would suggest, the existence of the fact with notice of which it is sought to charge him, in every case where a reasonably diligent inquiry and investigation of the facts so known would have led to the discovery of the existence of the fact or facts with which it is sought to charge him. If a person have notice of the existence of any fact or facts, a reasonably intelligent and prudent investigation of which would lead to the discovery or knowledge of the existence of any other fact or facts with the knowledge of which it is sought to charge him, and he fails to make such inquiry and investigation as a man of ordinary prudence and intelligence, having due regard for the rights of other persons, ought to make, then he is guilty of negligence. You are further charged that a bank, in accepting and paying a check drawn by a customer, is generally held to know the signature; and, if a forged check is accepted and paid, the bank, as a general rule, will not be heard to assert a mistake as to the signature. But the general rule is decisive only when the party receiving the money has in no way contributed to the success of the fraud, or to the mistake of fact under which the payment was made. If the loss can be traced to the fault or negligence of either party, it shall be fixed upon him. In the absence of actual fault or negligence on the part of the drawee, his constructive fault in not knowing the signature of the drawer, and detecting the forgery, will not preclude his recovery from one who has received the money with knowledge of the forgery, or who took the check under circumstances of suspicion, without proper precautions, or whose conduct

has been such as to mislead the drawee, or to induce him to pay the check without the usual scrutiny or other precautions against mistake or fraud. You are further charged that, if a bank accepts and pays a forged check drawn on it in the name of one of its customers, in order for the bank to recover back the money it must exercise reasonable diligence in the discovery of such forgery, and report the forgery to the party against whom it seeks to recover within a reasonable time after paying such check. And so in this case, if you find that the plaintiff did accept and pay a forged check, as alleged, and that said check purported to be drawn by one of plaintiff's customers, and that, believing the same to be true and genuine, the plaintiff paid the amount thereof to defendant, then, if defendants in no way contributed to the success of the fraud, or to the mistake of fact under which the payment was made, the plaintiff would not be entitled to recover in this case, and you will find for the defendants. But, if you should find that the defendants took the check in question from J. A. Crownover under circumstances of suspicion, without proper precautions, and failed to notify plaintiff of such suspicious circumstances, if any; or if you should find that defendants' representations, if any, to plaintiff, or their conduct, has been such as to mislead the plaintiff, or to induce plaintiff to pay the check without scrutiny or other precautions against mistake or fraud,—then, if you so find, you will find for plaintiff the amount of money so paid to defendants on said check, with interest thereon at the rate of six per cent. per annum from the date of such payment to the present time. You are further charged that the law will require the party receiving payment of a forged check to refund the amount received in payment of such forged check, if in so refunding the same he will be placed in a worse position than he was before the check was accepted and paid. And so in this case, if you believe from the evidence that the payment of such check did not cause or induce Peyton & Co. to place themselves in a worse position than they were before the check was paid, then, if you so find, you will find for plaintiff, even if plaintiff might have been guilty of negligence in the premises. If you should find from the evidence that the defendants received the check in controversy from J. A. Crownover, and in good faith presented the same to plaintiff before the goods purchased by said Crownover were in fact actually delivered to said Crownover by defendants; and if you further find that plaintiff, by the exercise of reasonable care and diligence, would have discovered the forgery, but that plaintiff did not use such care and scrutiny as a person of ordinary prudence would have used under the circumstances, but paid said check to the defendants before the

said goods were actually delivered; and if you further find that thereby defendants were placed in a worse position than they would have been had plaintiff refused to pay said check,—then, if you so find, you will find for defendants. You are the exclusive judges of the credibility of the witnesses and the weight of the evidence.”

Appellant contends that the court erred in admitting in evidence, over its objection, the testimony of two experts on handwriting as to the dissimilarity of the signature of W. P. Crownover on the genuine check drawn by him, as all the checks had been offered in evidence and submitted to the jury for their inspection. The testimony was pertinent and proper. The testimony was that the signature of the forged instrument was very dissimilar to those of the genuine checks. *Kennedy v. Upshaw*, 64 Tex. 420. The signature was admitted to be a forgery, but the question was whether plaintiff was negligent in failing to discover the forgery. The charge of the court was the law of the case, and all the law of the case, clearly and fairly presented, on the issues for both sides, showing under what circumstances, by the evidence, the plaintiff would be entitled to recover of defendants, and when it would not; the duties imposed upon both parties, and the legal consequences of a failure to perform those duties. There was no error in the charge, and it was not error to refuse instructions asked by plaintiff. The court below followed almost the literal language of the court in *Rouvant v. Bank*, 63 Tex. 612 (1), and it was applicable to the facts. The charge fully covered all the issues (2).

1. In *Rouvant v. Bank*, 63 Tex. 612, the court say: “A bank, in accepting and paying a draft drawn by a customer, is generally held to know the signature, and, if a forged draft is accepted and paid, the bank, as a general rule, will not be heard to assert a mistake as to the signature.” The court then point out certain exceptions to the general rule, and, quoting from *Bank v. Bangs*, 106 Mass. 444, say: “But this responsibility, based upon presumption alone, is decisive only when the party receiving the money has in no way contributed to the success of the fraud, or to the mistake of fact under which the payment was made. If the loss can be traced to the fault or negligence of either party, it shall be fixed upon him.” The opin-

ion then proceeds: “In the absence of actual fault or negligence on the part of the drawee, his constructive fault in not knowing the signature of the drawer and detecting the forgery will not preclude his recovery from one who has received the money with knowledge of the forgery, or who took the check under circumstances of suspicion, without proper precautions, or whose conduct has been such as to mislead the drawee, or to induce him to pay the check without the usual scrutiny or other precautions against mistake or fraud.”

2. See, also, *City Bank v. Nat. Bank*, 45 Tex. 218; 2 Daniel, Neg. Inst. (4th ed.) secs. 1654a, 1655, 1655a, 1656, 1657; 2 Morse, Banks, sec. 463.

The court's charge presented the question of the good faith of defendants, as well as their fault or negligence in not discovering the fraud, and this was sufficient upon the subject (1). There was evidence sufficient to sustain the verdict and there was no error.

Judgment affirmed.

Opinion by COLLARD, J.

ETHRIDGE v. SAN ANTONIA AND ARANSAS PASS RAILWAY COMPANY.

Court of Civil Appeals, Texas, January, 1897.

CROPS DAMAGED BY OVERFLOW — EXPERT EVIDENCE NOT NECESSARY.— In an action for damages to crops by overflow caused by alleged negligent construction of defendant's roadbed, it is competent for plaintiff, although not an expert, to prove the cause of the damage, where he is familiar with the facts of the overflow, and it was error to exclude such testimony.

DAMAGES — EVIDENCE.— It is error to exclude evidence of market-value of crops before and after the overflow, and if there was no market-value the actual value may be shown.

APPEAL by plaintiff from Caldwell County Court.

P. J. GREENWOOD and HARRIS & SON, for appellant.

A. B. STOREY, for appellee.

This case was tried originally in the Justice's Court, where plaintiff sued for damages to his crop of twenty-five acres of corn, caused by overflow due to negligent construction of defendant's roadbed. Plaintiff recovered \$125, but on appeal to County Court this judgment was reversed. Plaintiff offered to prove by his own testimony the cause of the damage, but this was excepted to by defendant on the ground that plaintiff was not an expert and his testimony was merely opinion of witness. The exception was sustained, to which ruling plaintiff excepted on the ground that he was not required to be an expert, he having shown knowledge of the place and the drainage both before and after construction of roadbed.

These rulings of the court are assigned as error, and we are of the opinion that the assignments are well taken. The plaintiff's testimony, besides what is shown in the bills of exception, showed that he had a crop of corn, as alleged, in May and June, 1895, and that the

1. Citing *Bank v. Farmers'*, etc. *Nat. Bank v. First Nat. Bank*, 30 Md. Bank, 10 Vt. 141; *Commercial*, etc. 11.

water backed up from the roadbed, and almost destroyed his crop, about twenty-five or thirty acres of it next to the railroad; that, before the road was built the water drained off, and did not back up on the farm, which had been in cultivation forty-five or fifty years; that the bridge across the creek was about thirty-five yards long; that a dump was thrown up on the north side, about five feet high, and extended for a mile towards Lockhart, and the country north and west (about two hundred and fifty acres) drains down on his farm; that there is but one culvert in the embankment, and no other way to allow the water to escape; and that the roadbed as constructed diverts the water from its natural course. The overflow in question occurred about May 20 or 21, 1895, and overflowed the land, as stated. The corn was in good condition, was bunching for tassel, had been well worked, and was a good stand, and would have yielded thirty-five to forty bushels per acre, had it not been overflowed, but it only yielded about ten bushels per acre. When a witness is familiar with the facts causing an overflow, he may give his opinion as to the cause, whether he be an expert in building embankments, bridges and culverts, or not. The testimony shows that plaintiff was competent to testify as to the cause of the overflow. *Railway Co. v. Klaus*, 64 Tex. 294; *Railway Co. v. Richards*, 83 Tex. 205, 18 S. W. Rep. 611. Questions are raised by appellant as to the refusal of the court to admit proof of the market-value of the crop before and after the overflow, and of its intrinsic value, and the amount of the damages. Proof may be made as to the value of a crop before and after an injury of the character complained of. The market-value must be proved, if it had such value, and, if it had not such value, then the actual value may be shown.

Reversed and remanded.

Opinion by COLLARD, J.

BORN v. TEXAS AND PACIFIC RAILWAY COMPANY.

Court of Civil Appeals, Texas, January, 1897.

ALIGHTING FROM TRAIN — CONTRIBUTORY NEGLIGENCE — CHARGE.— In an action for damages for injuries sustained while getting off a train it was error to charge that the burden of proof of contributory negligence was upon defendant unless the same appears from plaintiff's own negligence, because the use of the words "plaintiff's own negligence"

was misleading, as the jury might construe the same to be indicative of plaintiff's negligence, and was practically a charge upon the weight of evidence.

APPEAL by plaintiff from judgment rendered for defendant in the District Court, Dallas County.

LEAKE, HENRY, REEVES & GREER, for appellant.

ALEXANDER, CLARK & HALL, for appellee.

Appellant's statement of the case is accepted by appellee as correct, and is as follows: This was a suit by appellant to recover damages for personal injuries sustained while getting off defendant's train at Forney, Tex., July 6, 1894. The defendant pleaded a general denial and plea of contributory negligence. The jury brought in a verdict for defendant. The court overruled plaintiff's motion for new trial, to which plaintiff excepted, and has brought the case to this court on appeal. Plaintiff testified, in substance, that on July 6, 1894, he was a passenger on defendant's road going east from Dallas; that, before reaching Forney, he advised the conductor that he desired to stop at that point, and he had several packages with him, and to be sure to stop the train long enough for him to get off safely; that, on reaching Forney, he used all due diligence to leave the train, and carried out of the car some of his packages, and, as he was returning to the car for the remainder, he notified the conductor to hold the train until he could get his other packages off, which was fully understood by the conductor; but instead of holding the train for that purpose, and without stopping there a sufficient length of time to enable him to get off the train safely, the train was put in motion, and while it was going at the rate of two or three miles per hour, and had not gone more than forty feet from the stopping point, plaintiff, believing that he could safely do so, jumped from the train, and in doing so, fell, and thereby greatly injured himself in his knees and hands, from which injuries he has never yet recovered. The defendant proved by the conductor of the train that he had no recollection of the plaintiff's getting hurt at the place named, nor that plaintiff asked him to hold the train until he could get his baggage out of the car.

Appellant's assignment of error is: "The court erred in defining where the burden of proof lay of contributory negligence, the charge of the court being as follows: 'The burden of proof is upon the plaintiff to make out his case upon all issues save the question of contributory negligence, to show which the burden of proof is upon the defendant, unless the same appears from plaintiff's own negligence.' The charge of the court should have been as follows: 'The burden of proof of contributory negligence is upon the

defendant, unless the same is developed by plaintiff's case or evidence; whereas the court charged that 'the burden would be upon the defendant, unless the same appears from plaintiff's own negligence.' This was error for two reasons. 1. The use of the word 'negligence' in this part of the charge was misleading and confusing, leaving the jury without guidance in determining where the burden of proof of contributory negligence lay. 2. Because this part of the charge might be construed by the jury as indicating the opinion of the court that the plaintiff was guilty of contributory negligence, and, under the circumstances, was a charge on the weight of testimony, and calculated to mislead the jury, or, at all events, leave the question uncertain as to the law on the question of burden of proof."

This assignment of error is well taken. The error evidently occurred through inadvertence on the part of the court, but as the error is upon a material issue, and may have confused and misled the jury, we must treat it as material (1). The judgment of the court below is reversed, and the cause remanded.

Opinion by FINLEY, J.

1. The court cited the following cases upon the subject of getting on and off trains: *Tex. & Pac. R. Co. v. Murphy*, 46 Tex. 356, 6 Am. Neg. Cas. 462; *Galv. H. & S. A. R. Co. v. Smith*, 59 Tex. 406, 6 Am. Neg. Cas. 498; *Internat. & G. N. R. Co. v. Hassell*, 62 Tex. 256, 6 Am. Neg. Cas. 514; *Railway Co. v. Wilson*, 60 Tex. 144; *Railway Co. v. Best*, 66 Tex. 118, 18 S. W. Rep. 224; *Kan. & Gulf Short Line R. Co. v. Dorough*, 72 Tex. 108, 6 Am. Neg. Cas. 571; *Avey v. Galv. H. & S. A. R. Co.*, 81 Tex. 243, 6 Am. Neg. Cas. 602; *Tex. & Pac. R. Co. v. McLane* (Tex. Civ. App.) 6 Am. Neg. Cas. 721, 32 S. W. Rep. 776; *Louis. & Nash. R. Co. v. Crunk*, 119 Ind. 542, 3 Am. Neg. Cas. 229, 21 N. E. Rep. 31 and note; *Raben v. Central Iowa R'y Co.*, 74 Iowa, 732, 3 Am. Neg. Cas. 381, 34

N. W. Rep. 621; *Penn. R. Co. v. Peters*, 116 Pa. St. 206, 6 Am. Neg. Cas. 206, 9 Atl. Rep. 318.

As to the charge on contributory negligence the court cited *Railway Co. v. Greenlee*, 62 Tex. 349; *Emerson v. Mills*, 83 Tex. 388, 18 S. W. Rep. 805; *Hudson v. Morris*, 55 Tex. 607; *Railway Co. v. Schofield*, 72 Tex. 500, 10 S. W. Rep. 575; *Deery v. Cray*, 5 Wall. 795; *Association v. Shryock*, 20 C. C. A. 3, 73 Fed. Rep. 774; *Railroad Co. v. McDonald*, 2 C. C. A. 153, 51 Fed. Rep. 178; *Railroad Co. v. Harmon's Adm'r*, 147 U. S. 580, 13 Sup. Ct. 557.

Compare, also, the note on "Negligence as a Question for Jury," in 5 Am. Neg. Cas. 671, where the authorities on the question in the several States, together with English authorities, are collated.

JOHNSON V. HOCKER ET AL.

Court of Civil Appeals, Texas, February, 1897.

BRANDING CATTLE—IDENTIFICATION—BURDEN OF PROOF.—

Where defendants were alleged to have branded a number of cattle belonging to plaintiff and the said cattle were running on defendant's range, to the loss of plaintiff, it was error to charge the jury that they must find "proximately" what number of plaintiff's cattle were on defendant's range, as such a charge was misleading, for if defendants wrongfully branded and mingled plaintiff's cattle with their own, so that it was difficult to trace plaintiff's cattle, the defendants should be subjected to the loss of their property, and the proof of identification was upon defendants.

APPEAL from District Court, Reeves County.

T. J. HEFNER and PEYTON F. EDWARDS, for appellant.

TARLTON, CH. J.—The case made by the plaintiff and appellant, W. D. Johnson, receiver of the A. V. Cattle Company, as disclosed by his pleading and evidence, is that the defendants and appellees, B. W. Hocker and Adam Hocker, fraudulently established a certain brand, known as the A. T. 4 brand; that the defendants fraudulently caused this brand to be placed upon cattle belonging to the A. V. Cattle Company; that, if they really owned cattle in the A. T. 4 brand, they mingled and confused them with cattle belonging to the plaintiff, fraudulently thus branded; and that they thus sought to appropriate four hundred head of cattle, the property of the A. V. Cattle Company. This number of cattle the plaintiff sequestered and replevied. The case made by the defendants and appellees, as disclosed by their pleading and evidence, is that Adam Hocker, the son of his co-defendant B. W. Hocker, was the owner in good faith of the A. T. 4 brand, properly placed upon cattle belonging to him, and that if the brand was placed upon any cattle belonging to the A. V. Cattle Company, this occurred by mistake. The jury rendered a verdict in favor of the plaintiff for forty head of cattle, of the value of \$10 each.

The following is the third paragraph of the court's charge: "If you shall believe from the evidence that said A. T. 4 brand has been wrongfully placed upon some of the cattle or calves of the said A. V. Cattle Company, and that said calves or cattle so branded have increased, and such increase have likewise been branded with the A. T. 4 brand, and that Adam Hocker owned cattle in said A. T. 4 brand which he may have acquired from some other source, and that they are all—that is, all the cattle in the A. T. 4 brand are—running upon the

range together, then you must, if you can from the evidence ascertain proximately what cattle upon the range in the A. T. 4 brand belonged to the A. V. Cattle Company, if any; but if you cannot determine proximately from the evidence what number of the cattle in the A. T. 4 brand belong to the A. V. Cattle Company, if any, and you shall believe from the evidence that said A. T. 4 brand was placed upon the cattle of the A. V. Cattle Company, and that they were mixed up with other cattle on the range bearing the A. T. 4 brand, with the intention on the part of defendants to defraud the A. V. Cattle Company, then you will find for the plaintiff for all the cattle on the range in the A. T. 4 brand, but as to the number you will be governed by the evidence, and state in your verdict how many cattle you find in said brand for the plaintiff, if any, stating at the same time the value of such cattle, if you find for the plaintiff."

Under the evidence, which we have closely considered, we approve the appellants' criticism of the use of the word "proximately" in the foregoing instruction as misleading. We fail to find wherein the jury, under the testimony, could have ascertained that forty head of the cattle in question, belonging to the A. V. Cattle Company, could be distinguished from the remainder in the A. T. 4 brand, unless they were induced to that conclusion by the use of the word "proximately" in the connection stated. If the defendants, by their wilful misconduct, placed their brand upon cattle which belonged to the A. V. Cattle Company, and thus mingled the property of the latter with their own, in such manner that the distinction between the cattle of the plaintiff and those of the defendants could not be traced, the latter should be subjected to the loss of their property. Under such a condition, the task of distinguishing or identifying the cattle belonging to them from those belonging to the plaintiff devolves upon the defendants. Such is the law applicable to this state of facts, and the court should thus have charged the jury. *Brown v. Bacon*, 63 Tex. 599; 2 Wait Act. & Def. 241, and authorities there cited.

Reversed and remanded.

MISSOURI, KANSAS AND TEXAS RAILWAY COMPANY OF TEXAS V. JOHNSON ET AL.

Court of Civil Appeals, Texas, January, 1897.

CATTLE KILLED ON TRACK — EVIDENCE — NEGLIGENCE.— In an action against a railroad company for the negligent killing of plaintiff's cow and mule while upon defendant's track upon which they had strayed, judgment for plaintiffs was reversed as there was not sufficient evidence as to defendant's negligence, it not being shown whether the cattle strayed through a defective fence or through an open gate belonging to plaintiffs.

APPEAL by railway company from judgment for plaintiffs rendered in Dallas County Court. The facts appear in the opinion.

MARSHALL THOMAS, for appellant.

LIGHTFOOT, CH. J.— We adopt the statement of appellant, as follows: This suit was brought by L. W. Johnson and L. F. McShan on October 2, 1895, against the Missouri, Kansas & Texas Railway Company of Texas, in the Justice Court of Dallas county, Precinct No. 1, to recover the sum of \$150, the alleged value of one cow killed by defendant company on its track in Dallas county, Tex., July 11, 1895 (\$50) and one mule, killed by defendant company on its track in Dallas county on September 28, 1895 (\$100). Defendant railway company answered by a general denial, that its track and right of way was fenced when the injuries occurred, contributory negligence, and that plaintiffs loosened the wires of right of way fence. On November 7, 1895, the cause was tried before the justice of the peace, and judgment was rendered in favor of the plaintiffs for the sum of \$150. On November 15, 1895, defendant appealed to the County Court, and on February 19, 1896, the cause was tried before the court without a jury, and judgment was rendered in favor of the plaintiffs for the sum of \$150. On February 26, 1896, the court, upon request of appellant, filed conclusions of law and fact, which were duly excepted to, and the exceptions noted on the docket. The conclusions of fact found by the court below are as follows: "On July 11, 1895, a cow, the property of the plaintiffs, of the value of fifty dollars, entered upon the right of way of the defendant through a defective right of way fence, which had been defective for a sufficient length of time to charge defendant with knowledge of its condition, and the cow was struck and killed by defendant's train. On the night of September 28, 1895, one mule, of the value of \$100, the property of the plaintiffs, was killed by the defendant's train.

The evidence does not show how the mule gained access to the right of way, but it does show that the mule could have entered upon the right of way either through a partially open gate in the right of way fence kept up and maintained for the convenience of the plaintiffs, or through a defective right of way fence which had been defective for a sufficient length of time to charge the defendant with notice of its condition, and which fence separated the defendant's track and right of way from a certain field of the plaintiffs in which were growing crops of sugar cane, corn and cotton. There was no evidence to show that plaintiffs were accustomed to pasture the said field. The killing of plaintiffs cow and mule was at a point on defendant's track near Rowlett, Dallas county, Texas."

We find it unnecessary to pass upon the assignments of error in detail. The point is clearly presented by appellant that the court erred in rendering judgment for the value of the mule, for the reason that it does not appear that the animal was killed through the negligence of the appellant. It appears that the road was fenced, and that the appellant negligently allowed the fencing to be out of repair. It also appears that a gate had been put in by the company for appellees' benefit, and that they allowed this gate to be left partially open. Whether appellee's mule got upon the right of way through the open gate in appellee's charge, or through the defective fence, is not disclosed. Under this record we cannot presume that the injury occurred through appellant's negligence, and affirm a judgment based upon such presumption, when it would be equally as reasonable to presume that the mule entered through the open gate.

The facts regarding the gate are not fully presented, but, in the absence of any negligence in operating the trains of appellant, if the mule went upon the track through the open gate upon appellees' premises and such gate was put there for their benefit, and was under their control, and the company was not guilty of negligence in regard thereto, it would not be liable for killing the animal. *Railway Co. v. Glenn* (Tex. Civ. App.), 30 S. W. Rep. 845. For the error above indicated, the judgment is reversed, and the cause remanded for a new trial.

Reversed and remanded.

GULF, COLORADO AND SANTA FE RAILWAY COMPANY v. GAEDECKE.

Court of Civil Appeals, Texas, January, 1897.

FAILURE TO STOP TRAIN AT FLAG STATION—EXCESSIVE DAMAGES.—The sum of \$150 excessive in an action to recover for failure to stop train at flag station to take on passenger, as there was nothing to show any great inconvenience to plaintiff, resulting from such failure, and judgment of County Court reversed and judgment ordered for \$10.

APPEAL by defendant from Washington County Court. The facts appear in the opinion.

J. W. TERRY and CHAS. K. LEE, for appellant.

BEAUREGARD BRYAN, for appellee.

FLY, J.—This appeal is from a judgment for \$150, in favor of appellee, for damages alleged to have accrued by reason of a failure of appellant to heed the signals at a flag station, and stop and receive appellee, and transport him to Brenham, as it had contracted to do by selling him a ticket. The case was tried without a jury. Excess in the judgment is the only error assigned. The facts show that appellee, with some companions, boarded the train of appellant at Brenham on a certain morning, with the intention of going some fifty miles to Fort Bend county, on a hunt, having been informed by the agent at Brenham that they could return the same day, by taking the train at 10:37 o'clock P. M. at Orchard station. After spending the day hunting, appellant and companions went to Orchard station, and bought return tickets, paying \$1.50 each for the same. Orchard was a flag station, at which the trains would not stop to take on passengers without a signal. The signal was given, but the train was not stopped. Appellee made no effort to secure lodgings at Orchard, although a number of houses were near the station, at two of which guests were received, but, with his companions, walked eight miles to Wallis, where he secured lodging and breakfast, and in the forenoon returned by train to Brenham. At Wallis he bought and paid for a ticket to Brenham, and was never repaid the amount he paid for the ticket from Orchard to Brenham. Appellee paid, in Wallis, fifty cents for lodging and fifty cents for his breakfast. If the effect of the walk from Orchard to Wallis could be charged to appellant, which we are not inclined to hold, still the findings of the judge fail to disclose any serious inconvenience from it. He does not claim to have contracted a cold from it, or to have

experienced an ache or pain by reason thereof. We see no circumstance in the case that was calculated to cause appellee to suffer great anxiety, vexation, and annoyance. The evidence does not indicate that he was engaged in any business that suffered in the least by his failure to reach Brenham when he desired. The measure of damages in the case would be the amount paid for the ticket, and such disappointment, inconvenience, expense, and loss of time as were shown to have resulted directly and proximately from a failure to stop the train at Orchard, and receive appellee on board. *Railway Co. v. Gilbert*, 64 Tex. 536; *Railway Co. v. Terry*, 62 Tex. 380; *Railway Co. v. Flores* (Tex. Civ. App.) 26 S. W. Rep. 899. The damages are clearly excessive and disproportionate to the injuries received by appellee, and cannot meet with the approval of this court. *Railway Co. v. Cleveland* (Tex. Civ. App.), 33 S. W. Rep. 687; *Eddy v. Harris*, 78 Tex. 661, 15 S. W. Rep. 107.

It is contended by appellee that the question of excess in the verdict should not be considered, because the matter was not called to the attention of the trial judge in a motion for a new trial, and numerous authorities are cited to sustain this position. In all the cases referred to, however, the judgments were based on the verdicts of juries, and in such cases motions for new trial are prerequisites to an appeal, and, when made, should complain of all matters relating to the evidence. But this case was tried without a jury, and no motion for a new trial was made, and neither was one required by law, and, of course, the contention of appellee is without force.

We are of the opinion that \$10 would compensate appellee for all the anxiety, inconvenience, and expense that resulted to him by the failure to stop the train and carry him to Brenham; and the judgment of the County Court is therefore reversed, and judgment here rendered in favor of appellee in that sum.

MISSOURI, KANSAS AND TEXAS RAILWAY COMPANY OF TEXAS v. RODGERS.

Court of Civil Appeals, Texas, February, 1897.

BOY INJURED ON PUSH CAR — INSTRUCTION.— In an action to recover damages for injury to a boy while riding on a push car of defendant, the case, according to the pleadings, should have been presented to the jury on the theory that the boy was not of sufficient intelligence, by reason of his age, to realize danger of getting on the car; and it was error to charge that

recovery could be had even if it was shown that the boy possessed mature judgment, if defendant's employees gave permission to ride on car.

DAMAGES. — The measure of damages was loss of service until the age of twenty-one years, expense of medical attendance, etc., rendered necessary by the injury, and a charge which failed to so state the measure of damages was error.

APPEAL from judgment for plaintiff in the District Court, Hill County. The opinion states the facts.

T. S. MILLER and STANLEY, SPOONTS & THOMPSON, for appellant.
SMITH & WEAR, for appellee.

FLY, J.— Appellee sued appellant to recover the sum of \$2,024 damages, which he alleged he had sustained by injuries inflicted upon his minor son, Sam H. Rodgers, who was twelve years of age when injured. The jury returned a verdict for \$800, and judgment was rendered for that sum. This case differs in no particular from the case of *Missouri, K. & T. R'y Co. v. Rodgers*, which was affirmed by this court (35 S. W. Rep. 412) and was reversed by the Supreme Court (36 S. W. Rep. 243), except that in the latter case the party injured was suing for damages, and in this case his father instituted the suit.

The first, second, third, and fourth assignments of error bring in review the action of the district court in sustaining exceptions to that part of the answer which alleged that the injuries of the boy were received while riding on a push car, in violation of the rules of the company, which prohibited all persons but employees from riding on the push car; and to that part of the answer which alleged that, if the servants of appellant invited or permitted the boy to ride on the push car, they were acting beyond the scope of their authority; and also in rejecting testimony to the effect that appellant had issued instructions to employees, forbidding them to allow persons to ride on any but passenger cars, and that they had been instructed to allow none but employees to ride upon push cars. It was alleged that Sam H. Rodgers was, when injured, "very young, and of immature judgment and discretion, and yielded to the suggestions of defendant's servants and employees" in getting upon the push car. Under the allegations in the petition appellee could have recovered only upon proof that the boy, by reason of his age and lack of intelligence, did not possess the capacity to realize and appreciate the danger of getting upon the car. That was the only case made by the pleading, and was the only case that could be shown by the proof; and it was no defense to such case to allege and prove that the servants of appellant had been instructed not to permit any one but employees to ride on the push car. *Cook v. Navigation Co.*, 76

Tex. 353, 13 S. W. Rep. 475; *Railway Co. v. Rodgers* (Tex. Sup.), 36 S. W. Rep. 243. The case should have been presented to the jury on the theory outlined, but it was not done; but a charge was given that allowed a recovery for appellee, even if the boy had been shown to be possessed of mature judgment, if he had been invited or permitted by the employees of appellant to get on the car. If a charge presenting a phase of case under which appellant was liable, although the boy had sufficient discretion to understand the danger of the position he had assumed, was admissible under the pleadings, then the court should not have sustained the exceptions to the answer or the proof, which presented the defense that, if the employees invited the boy to get upon the car, they did so in violation of rules and instructions given them by appellant; for the defense fully met the case of one of mature judgment getting on the car at the request of an employee without authority to make the request. *Railway Co. v. Cock*, 68 Tex. 713, 5 S. W. Rep. 635; *Railway Co. v. Rodgers*, *supra*.

The fifth assignment, which criticises that portion of the charge which makes the appellant liable if its employees invited the boy to ride upon the car, regardless of the maturity or immaturity of his discretion, is, for the reasons above stated, well taken. The ninth assignment of error is without merit. The case as made by the pleadings was as to a boy of immature judgment, and it did not matter, under that state of case, how the boy got off the car; and a presentation of the issue of his jumping off could not have injured appellant. There was some testimony, though exceedingly meagre, indicating that the boy did jump off. The tenth assignment is not well taken. If the boy was without mental capacity to understand the danger of riding on the car, and he was invited or permitted by the employees of appellant to ride on the car, and was thereby injured, appellant would be liable for the damages, whether the employees knew of the incapacity of the boy, or not.

The measure of damages in this case was "loss of service of the son until the age of twenty-one years, expense of medical attendance and of nursing, and such other expenses as are rendered necessary by the injury." *Railway Co. v. Miller*, 49 Tex. 322; *Railway Co. v. Redeker*, 75 Tex. 310, 12 S. W. Rep. 855. The measure of damages of appellee, as fixed by the charge, was "such damages, if any, as he may have suffered by reason of Sam's inability to labor since his injury, and his ability to labor without such injury, and the sum plaintiff had to pay for the professional services of physicians attending said Sam, because of his said injury, and the reasonable value he had to pay for the services of nurses, if any, waiting upon said Sam,

because of his said injuries, and also the reasonable value of the services of the plaintiff and his wife for the time they had to devote to the nursing of said Sam, because of his said injury." The charge not only fails to give the proper measure of damages, but it is so obscure as to be almost unintelligible, and was well calculated to mislead and confuse the jury.

It will not be necessary to notice the other assignments of error. For the errors indicated, the judgment will be reversed, and the cause remanded.

SONNEFIELD ET AL. V. MAYTON.

Court of Civil Appeals, Texas, January, 1897.

INJURED BY FALL OF TIMBER — OPINION OF WITNESS.— In an action by an employee to recover for injuries sustained by the fall of a pile of lumber, it was error to permit a witness to state what he, or an ordinarily prudent man, might have done under similar circumstances, as that was a question for the jury to determine.

INSTRUCTION.— An instruction which bears upon the weight of evidence is reversible error.

APPEAL from judgment rendered for plaintiff in the District Court, Dallas County.

JOHN BOOKHOUT, for appellants.

W. L. McDONALD, for appellee.

The following statement of the case is based upon the briefs of both appellants and appellee: On October 1, 1889, J. W. Mayton, plaintiff, instituted this suit against C. W. Guild and G. W. Sonnefield and H. J. Emmins, the two last-named persons being partners, and composing the firm of Sonnefield & Emmins, defendants. It was alleged by plaintiff that said firm entered into a written contract with C. W. Guild to do the carpenter work on the four or five-story brick building being erected by Guild in the city of Dallas, Tex., and that said Sonnefield & Emmins, with the knowledge and consent of said Guild, employed plaintiff to do labor and carpenter work in and about the erection of said building; "that prior to his employment by said defendant firm, each and all of said defendants, acting together, carelessly and negligently caused and directed divers and sundry large and heavy pieces of lumber, which were to be used in the construction of said building, to be carelessly and negligently placed in divers and sundry piles or stacks of great height, to wit, twelve feet high, on the uneven surface of the bois

d'arc pavement near the curbing, parallel with said street, and in front of said building being constructed: Plaintiff avers that afterwards, to wit, on June 5, 1889, during the course of his engagement with defendants, and in the discharge of his duties, and while in their employment, and working under their directions and orders, in the line of his duties in such employment, he was required and directed by the defendants to remove the lumber from the middle pile of three large and high piles of heavy lumber; and while so engaged it became necessary for him to go between said piles of lumber; and plaintiff, being young and inexperienced in such matters, and not knowing that there was danger of the pile of lumber falling on him, and the danger not being apparent to him, and having, only a few minutes before being injured, been assured by one of said defendants, who was present, and saw the way said lumber was piled, and who was and is an old and experienced mechanic, in whose judgment plaintiff reposed great confidence, that said piles of lumber were securely propped, and that there was no danger of it falling, and while so engaged, without any fault or negligence on the part of plaintiff, one of said piles of heavy lumber, by reason of the careless and negligent manner in which said lumber was piled and allowed to remain piled on the uneven surface of said street, and by reason of the improper, frail, weak, and insufficient props or supports, and the careless and negligent manner in which they were placed between said two outside piles of lumber, fell, with all its immense weight, about one hundred tons, and the force and pressure of said pile of lumber, upon the body and limbs of plaintiff, thereby crushing plaintiff to the earth and over against another pile of lumber, and rendering him unconscious and lifeless for a long time after the lumber was removed from him, and inflicting on and upon the body, limbs, and mind of plaintiff great physical and mental suffering and irreparable injuries, to wit, breaking three of his ribs, his thigh and leg, right arm in two places, and collar bone, and crushing in his breast, and inflicting serious and unknown internal injuries, a severe cut and fracture in the head and skull, and other painful and serious injuries. And plaintiff says that by reason of said injuries he was compelled to remain confined to his bed in the city hospital for a long time, to wit, ten weeks, being a poor man, and a stranger, without the solace of friends or the assistance of money. And from all said injuries plaintiff says he has suffered, and continues to suffer, great pain of body and mind, indescribable mental anguish, loss of a large amount of valuable time, and that by reason of said injuries he is rendered unable to pursue his trade as a carpenter, or to do any other manual labor whatever; that before

receiving said injuries he was a healthy, robust young man of, to wit, twenty-five years of age, and capable of earning, and was earning, large sums of money at his trade, to wit, two dollars and fifty cents per day; but by reason of the carelessness and negligence of defendants as aforesaid, and thereby the inflicting upon him, plaintiff, of said great suffering and injuries, plaintiff has been shorn of his strength in the bloom and glory of young manhood, deprived of his only means of support, and rendered a weak, helpless, and hopeless cripple and invalid for the remainder of his natural life, to his actual damage in the sum of twenty-five thousand dollars, for which he prays judgment." Defendants Sonnefield & Emmins answered: 1. By general demurrer. 2. By general denial; and 3. By special answer, setting up that if plaintiff was injured as alleged in his petition, his injuries were brought about by his own contributory negligence in recklessly and carelessly going between the piles of lumber when there was no necessity therefor, and when the proper and safe place was at the end of the pile of lumber, and when he had been repeatedly warned and cautioned not to go in between the piles of lumber where he was injured; and that, if plaintiff was injured as alleged in his petition, his injuries were not occasioned by any fault of these defendants, but arose from an accident and casualty incident to the business in which he was engaged, with the character of which he was familiar, and the risk of which he assumed when he entered into the employment of the defendants; and that, if he was so injured as alleged in his petition, his injuries were occasioned by the act and negligence of a fellow-servant of the plaintiff, and he cannot recover of defendants. Defendant Guild answered: 1. By general demurrer; 2. By general denial; and 3. By special answer, in which he set up that, if plaintiff was injured as alleged, his injuries were occasioned by his contributory negligence in recklessly and carelessly going between the said piles of lumber, when the proper place was at the end of the pile; that if plaintiff was injured as he alleged, it was from no fault of this defendant or any other person, but the result of accident and casualty incident to his employment, the risk of which he had assumed when he accepted service under defendants Sonnefield & Emmins; that plaintiff was not in the employ of this defendant (Guild) at the time of his injury; that he never knew plaintiff, and did not know that he was engaged at work on the building; that he had nothing whatever to do with the employment of the plaintiff, or with the work upon which plaintiff was engaged upon said house; that said lumber was not piled on the premises of this defendant; that the defendants Sonnefield & Emmins were under contract with the defendant to do the carpentry

work upon said house, and that this defendant had and exercised no supervision or control whatever over the said Sonnefield & Emmins in their work, or the hands and employees engaged under their direction in said carpentry work, etc.; and that, if plaintiff was injured as alleged, his injuries were caused from the carelessness and negligence of a fellow-servant of plaintiff. There was a jury trial, and a verdict for the plaintiff against defendants Sonnefield & Emmins for \$1,000, and in favor of the defendant C. W. Guild. A judgment against the defendants Sonnefield & Emmins was duly entered, from which judgment this appeal is prosecuted.

One of the main issues in the case arising upon the trial was the issue of contributory negligence on the part of plaintiff in going between the piles of lumber where he was injured. The contention of the defendants was that the danger was obvious, and that the plaintiff had been instructed by his employer, one of the defendants, not to go in between the piles of lumber, but to take the lumber from the end of the pile. The evidence introduced gives the opinion of the witness both as to what an ordinarily prudent man would have done under like circumstances, and what the witness would have done had he been placed in plaintiff's situation. The conclusion or opinion which the witness expressed was the very issue which the jury were called upon to determine from the evidence in the case. It was not for the witness to determine and express his opinion as to what an ordinarily prudent man would have done. His standard may have been quite different from that which would have been reached and determined upon by the jury. The law does not allow the gauge or standard of an ordinarily prudent man to be fixed by the opinion of witnesses, but it must be reached from the conclusion of the jury trying the case. What the witness would have done himself under like circumstances is even more objectionable than his opinion as to what an ordinarily prudent man would have done. The witness himself is not the standard recognized by law of ordinary prudence, and he may have been, for aught we know, himself a very imprudent man. The evidence is further objectionable because the witness discloses the fact that he did not examine and notice whether the pile of lumber was dangerous, and his testimony is based upon the hypothetical case presented by the question. This was not a matter requiring scientific knowledge and expert opinion. It was a matter that a common, unscientific mind could readily reach conclusions about without the opinions of experts. The court seems to have admitted this evidence upon the idea that the objections urged by counsel relate to the form and manner of taking the depositions, and that no motion was urged before the trial for the suppression

of the depositions. We think the objections clearly went to the competency of the evidence, as well as to the form and manner of taking the depositions, and that they should have been sustained. *Fordyce v. Lowman* (Ark.), 34 S. W. Rep. 255; *Benjamin v. Railway Co.*, 34 S. W. Rep. 590.

It is assigned as error that the court refused to give the following special charge: "If the jury find and believe that J. W. Mayton, previous to and at the time of receiving the injury, was just as well aware of the dangerous condition of the pile of lumber as his employers, or that he had equal means of knowing the danger, by reason of the situation in which he was placed and the work which he was doing, to discover the condition of the pile of lumber as did his employers, *Sonnefield & Emmins*, and the danger was open, and could be discovered by the plaintiff at the time of the injury by the use of ordinary diligence; and you further find that the plaintiff at the time was a man of ordinary capacity and judgment,—then you are instructed that the plaintiff was guilty of contributory negligence, and would not be entitled to recover, and your verdict should be for the defendants." This charge is not couched in exact and technically correct language. The concluding part of it treats the conditions therein named as constituting contributory negligence; whereas it would have been a case of assumed risk. It also uses the word "diligence," where the use of the word "care" would have more accurately announced the law. The general charge of the court is not sufficiently full upon this feature of the case to have justified a failure to charge the substance of this special charge. *Railway Co. v. Johnson*, 83 Tex. 628, 19 S. W. Rep. 151; *Railway Co. v. Somers*, 78 Tex. 439, 14 S. W. Rep. 779; *Railway Co. v. O'Fiel*, 78 Tex. 486, 15 S. W. Rep. 33; *Railway Co. v. Dillard*, 70 Tex. 62, 8 S. W. Rep. 113.

This further special charge was asked, which correctly stated the law: "The jury are further instructed that it was the duty of plaintiff to exercise such care and caution in his employment as a person of ordinary care and prudence would have exercised. If you find and believe from the evidence that the pile of lumber which fell upon him was dangerous, and the danger was known to plaintiff, or could be discovered by the use of ordinary care and diligence, then you are instructed that the plaintiff cannot recover." The general charge of the court is criticised as to this clause: "Having regard to the above sections of the charge, if you find and believe that the defendants, or any of them, were guilty of negligence in the piling and bracing of said lumber as it was piled and braced, and in directing plaintiff to work therewith," etc. It is complained that this

charge assumes that the bracing of the lumber was done by the defendants, when the evidence tended to show that the lumber was braced by the plaintiff himself. This contention we do not think presents a fair construction of the language of the charge. Appellants further urge that the charge assumes that defendants instructed plaintiff to go in between the piles of lumber, when there was evidence tending to show that he was directed not to go in between the piles of lumber, but to pull the lumber out from the end of the pile. This criticism of the charge is not wholly without foundation. The charge should be carefully framed, so as not to bear upon the weight of the evidence.

Judgment reversed.

Opinion by FINLEY, J.

GALVESTON, HARRISBURG AND SAN ANTONIO RAILWAY COMPANY v. HENNING.

Court of Civil Appeals, Texas, January, 1897.

EMPLOYEE INJURED IN COLLISION—SIGNAL—INSTRUCTION.—

Where an employee was injured in a collision a charge to the jury to determine whether engineer failed to observe the proper signals is proper, it not being necessary to inform the jury what constitutes a "proper signal," as that was a question of fact for jury to determine.

INSTRUCTION—CONTRIBUTORY NEGLIGENCE.—Omission to charge that if plaintiff was guilty of any negligence which was the proximate cause or contributed to his injury, he could not recover, was not error, where, in a preceding paragraph, "negligence" was said to be "a failure to use ordinary care."

APPEAL from judgment rendered for plaintiff in the District Court, Bexar County.

UPSON, BERGSTROM & NEWTON, for appellant.

H. C. CARTER and PERRY J. LEWIS, for appellee.

The evidence warrants the following conclusions of fact: The appellee was a brakeman in the employment of appellant, and when the accident occurred the train crew with whom he was working consisted of George Wade, conductor; West Daniels, engineer; George Askin, fireman; Pete Martin, head brakeman; and appellee, rear brakeman. On the morning of November 12, 1893, appellee, together with the other members of the crew, left San Antonio on a freight train going west; appellee being informed by the conductor that it would have to pick up and attach a water car at D'Hanis to

the train. The water car was attached to two stock cars on a side track upon which the engineer ran his engine, and it was coupled — Martin doing the coupling — to three cars, and they were pulled out on the main track. Then Martin threw the switch for the main line, and cut the water car off from the stock cars, and shoved it down on the main line. He then took up the two stock cars, and ran them on the side track, where he left them. Then he ran his engine down on the main track to the water car, and it was coupled to the engine. In making this coupling the other end of the water car was pushed against the freight train, and appellee, whose duty it was to couple it to the train, signaled the engineer to move forward a little; and when he had moved the water car about ten feet from the car next to it, of the train, appellee, while in view of and seen by the engineer, stepped in between them to make the coupling. He could not, however, be seen by, or see, the engineer, after he went between the cars. Appellee then endeavored to lift the Jenny coupler, which was attached to the box car, and weighed between one and two hundred pounds, and, having his back towards the engine, called to Martin to come and help him. Martin, mistaking his call, signaled the engineer to back, and then, while appellee was standing with his back to the engine, trying to adjust the coupling, the engineer backed his engine, shoving the water car against the box car, crushing appellee's left arm between them, and so mangled his arm as to cause its amputation. The first thing appellee knew of the engine being moved was when his arm was caught between the cars. The bell was not rung, nor any warning of any character given that the engine was being moved. It was the engineer's duty not to move his engine for the purpose of pushing the water car up to the box car until he should receive a signal so to do from the appellee; nor then without giving warning of his doing so without ringing the bell. West Daniels, the engineer, was incompetent and reckless, and his incompetency and recklessness were known, or could have been known, by appellant by the exercise of ordinary care or prudence. The moving of the engine by Daniels without receiving a signal from appellee, and without ringing the bell, was negligence on the part of said engineer, which negligence proximately flowed from his incompetency and recklessness. The appellant was negligent in retaining Daniels in its service, knowing of his incompetency and recklessness; and this negligence of the company, together with the said negligence of Daniels, was the efficient and proximate cause of appellee's injury. The appellee was guilty of no negligence proximately contributing to his injury, nor was the risk to which he was exposed when injured such as was ordinarily incident to his employment.

But his peril and injury were the proximate result of said negligence of appellant and of its engineer, whom it knew to be incompetent. Up to the time he was injured, the appellee had no knowledge of Daniels' incompetency or recklessness. The appellee was damaged in the amount found by the jury, viz., \$7,500.

The seventh paragraph of the court's charge is as follows: "If, from the evidence, you believe that the plaintiff was injured as alleged in his petition, and that such injury directly resulted from the engineer, West Daniels, backing the car upon him without receiving or giving a proper signal before the engine was moved, and that the moving of the engine by said Daniels was, under all the facts and circumstances in this case, negligent; and you further believe from the evidence that said Daniels was an incompetent or reckless engineer, and that his negligence, if any, in moving said engine without receiving or giving the proper signal therefor, resulted from or was caused by his incompetency or recklessness as an engineer, should you find from the evidence that he was incompetent or reckless, and that the defendant knew of any such incompetency or recklessness of said Daniels, or could have known of it by the use of ordinary care, and was negligent in employing and keeping said Daniels in its service as an engineer; that the plaintiff did not know, and could not, by the exercise of ordinary care, have known of the incompetency or recklessness, if any, of said Daniels,—then your verdict should be for the plaintiff, unless you further find from the evidence that plaintiff was guilty of contributory negligence, or assumed the risk, as herein defined." It is complained that this charge is erroneous in that it fails to inform the jury what constitutes a proper signal. Our opinion is that the question as to what would constitute a proper signal is one of fact, which, in any given case, must be determined by the jury from all the facts and circumstances attending the transaction, unless the signal is such as enjoined by statute. Should we not be correct in this view, still the charge, as far as applicable to the facts, is correct; and, if appellant desired a charge defining what would be a proper signal, it should have requested it. *Railway Co. v. Arispe*, 81 Tex. 17, 517 S. W. Rep. 47; *Railway Co. v. Gay*, 86 Tex. 609, 26 S. W. Rep. 599. It is also insisted that this paragraph of the charge is erroneous "because there is no evidence that the defendant knew of the recklessness or carelessness of said engineer, or that it was guilty of any negligence in employing said engineer, and that by the submission of such issue the jury were induced to believe that there was some evidence from which they could lawfully find that defendant knew of such incompetency or recklessness, or that it was guilty of

negligence in employing said engineer." An exception to the rule that a master is not liable in damages for an injury inflicted by one of his servants upon another one of them engaged in the same employment arises where the master employs a servant who is not competent for the duties which he is required to perform, and where, by reason of his incompetency, another servant of the same master is injured. This exception rests upon the ground that the master, in selecting the servant, or in maintaining an inspection over him, has been guilty of negligence. In such case the object of the law is to award damages only for the personal negligence of the master, and not merely for the negligence of the servant. The portion of the charge complained of recognizes and proceeds strictly upon the principle of this exception to the general rule, and, in our opinion, is fully warranted by the evidence. It showed that, from his general reputation among the employees of appellant engaged in service with him, Daniels was incompetent, reckless, and unfit for the duties of an engineer. This reputation was admissible as evidence against appellant, for the reason that it was under obligation to inquire into the character of its servant Daniels, and its failure to learn of his general reputation among its employees was of itself negligence. *Railway Co. v. Johnson* (Tex. Sup.), 35 S. W. Rep. 1044. In the case cited the Supreme Court quotes with approval from *McKinney on Fellow-Servants* as follows: "Evidence of general reputation is admissible to prove the unfitness of a fellow-servant, and ignorance of such general reputation on the part of the master is itself negligence, in a case in which proper inquiry would have obtained the necessary information, and where the duty to inquire was plainly imperative." From this it appears that there was evidence that the appellant knew of recklessness or carelessness of said engineer, and of its negligence "in employing and keeping said Daniels in its service as an engineer." The word "employing," as used in the part of the charge just quoted, cannot, in our opinion, be construed as relating to the original act of appellant in employing Daniels, but obviously refers to its act of having him employed in its service when appellee's injury was inflicted. If, however, it could be construed as relating to his original employment, appellant could not complain of it; for in that event appellee would have to show negligence on the part of appellant in employing Daniels, as well as knowledge of his incompetency at the time of the accident, before he could recover. This would be to appellant's advantage, in that it would impose upon appellee the burden of proving a fact not essential to his recovery. There can be no doubt that this section of the charge, when given its plain and obvious meaning, required

the jury to find that plaintiff did not know, and could not by the exercise of ordinary care have known, of the incompetency of Daniels, before they could return a verdict in plaintiff's favor.

The eighth section of the charge is as follows: "If you believe that the plaintiff did not exercise ordinary care to prevent injury to himself, and that his failure to use ordinary care was the proximate cause of his injury, then he cannot recover in this action; or should you find that any risk to which he may have been exposed was only such as was ordinarily incident to the employment, in that event, also, your verdict should be for defendant." It is assigned as an objection to this portion of the charge that it should have instructed the jury that, if plaintiff was guilty of any negligence which was the proximate cause, or contributed to his injury, he could not recover. In a preceding paragraph the jury were informed that "negligence," as used in the charge, "means a failure to use ordinary care." Then it gives the court's definition of the phrase "ordinary care." Instead of using the word "negligence," as appellant insists should have been done, the court substituted its legal significance, which served only to make the charge more perspicuous. In its legal signification, contributory negligence is such an act or omission on the part of plaintiff, amounting to a want of ordinary care, which, concurring with some negligent act of defendant, is a proximate cause of the injury complained of. *Martin v. Railway Co.*, 87 Tex. 121, 26 S. W. Rep. 1052; *Railway Co. v. McClain*, 80 Tex. 96, 15 S. W. Rep. 789. The charge is a clear enunciation of this well-understood principle of law, and is not obnoxious to appellant's objection to it. If the charge should be deemed open to the objection urged, the error would be simply one of omission; and, if appellant desired the court to add anything to it, it was its duty to request a special instruction.

Objections are urged to certain questions to a witness in that they call for the mere opinion of the witness, and not for any rule of the company; and to the answers, that they are the opinion of the witness, not referring to any rule of the defendant company, and are wholly immaterial, irrelevant, and secondary evidence. Before answering these questions, the witness had shown his special knowledge of the subject of inquiry by stating that he had been engaged in the railroad business from 1881 to 1895, of which time he had worked for about eight years as a locomotive fireman, about four years as a brakeman, and locomotive engineer about two years; during most of this time he worked for appellant company; and that he was fully acquainted with the running of trains and locomotives, and their management, and also with the duties of engineers and trainmen generally. He also testified that he meant by "a

general rule," "the rule that is generally adopted by the railroad men in doing certain work, and the rule may or may not be in the written rules of the company;" that he did not think there was any written rule about taking signals from the man who goes between the cars to make couplings, but thought there was a written rule requiring the bell to be rung before moving the engine. If the answers of the witness should be regarded as expressive of its opinion, we believe that he has shown such special knowledge of the subject of inquiry as to entitle him, as an expert, to give such an opinion. But we believe his testimony should be understood rather as a statement of the existence of facts than as a statement of his opinion,—facts which he shows himself familiar with. He gave no opinion of the safety of a rule given or adopted for the guidance of railroad employees. Had he done so, it would perhaps have been improper. *Nary v. Railroad Co.*, 125 N. Y. 759, 27 N. E. Rep. 408. But he simply stated the rules "generally adopted by the railroad men in doing certain work," without expressing any opinion as to its propriety or safety. The fact stated was a legitimate subject of inquiry, and pertinent to the issues made by the pleadings. The answers of the witness did not show better evidence than his statements of the existence of the rule. If better evidence was obtainable, it was within the knowledge of appellant, and in its power to produce it, which it failed to show or do. That the answers were not responsive to the interrogatories is an objection going to the manner and form of taking depositions, and could not be considered, the first term of the court after they were filed having passed. Besides, all the testimony complained of was brought out from another witness without objection. What we have said also applies to the interrogatories and answers referred to in the ninth assignment, and it is unnecessary for us to lengthen this opinion by further mention or discussion of them.

Judgment affirmed.

Opinion by O'NEILL, J.

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JACKSON v. NORFOLK AND WESTERN RAILROAD COMPANY (1).

Supreme Court of Appeals, Charleston, West Virginia, April, 1897.

MASTER AND SERVANT — FELLOW-SERVANT.— The test whether a master is liable to one servant for the negligence of another servant is the character of the negligent act. If it be in the doing of an act incumbent on the master as a duty of the master to the servant, the master is liable; otherwise not.

THE SAME.— A master's liability to one servant for the negligence of another is not dependent on the grade of the servants, nor on the fact that one has authority over the other, but on the character of the negligent act.

THE SAME.— A conductor is a fellow-servant with a brakeman and other servants on a train, not a vice-principal.

THE SAME.— All servants engaged in the common service of the same master in conducting and carrying on the same general business, in which the usual instrumentalities are employed, are fellow-servants. A proper test of this rule is, whether the negligence of the one is likely to occur and inflict injury on the other.

THE SAME.— If a vice-principal, in the particular act in which his negligence occurs is not in the line of his duty, but performing an act in the line of one who would be a fellow-servant with the injured servant, the master is not liable for the negligence of the vice-principal, as he is, as to this act, a fellow-servant with the injured one.

(Syllabus by the court.)

THE facts of the case are stated in the opinion by the court.

DOUGLASS & McNUTT, for Murray T. Jackson.

JOHNSTON & HALE and A. W. REYNOLDS, for the Norfolk and Western Railroad Company.

BRANNON, J.— Jackson was a brakeman in the service of the Norfolk and Western Railroad Company, and was on a freight train with Gilbert as conductor. A train was being backed so as to couple it to some cars. Gilbert was standing on top of the rear car of the train that was backing, and an unsuccessful effort was made to

1. The ruling in this case has an important bearing upon the law of Master and Servant, and the liability for injuries sustained, owing to negligence of a fellow-servant, hitherto prevailing in West Virginia, and reverses the doctrine formerly held in that State.

Compare this case with Union Pacific

R'y Co. v. Doyle (Neb.), 1 Am. Neg. Rep. 308, *ante*, where the relations of fellow-servant and vice-principal and master and servant are discussed, citing many of the authorities discussed in the case at bar and the rulings in the State of Nebraska.

See, also, Oakes v. Mase (U. S. Sup.), 1 Am. Neg. Rep. 544, *ante*.

couple the cars, and the train was drawn forward preparatory to a second attempt, and Gilbert waived the engineer to back up to the car, and Jackson, seeing this, attempted to jump back, and in so doing his arm was caught between the bumpers and crushed, rendering its amputation necessary. Jackson sued the company, recovered judgment, and it sued out this writ of error.

This case involves the question whether Gilbert, the conductor, and Jackson, the brakeman, were fellow-servants, so as to exempt the company from liability for the alleged negligent act of the conductor in improperly calling the train back when he did.

The defendant's counsel have filed briefs, very lucid and able, in which they ask us to review this subject of fellow-servantcy (to coin a word to express the idea in one word). By fellow-servantcy we mean that where there are two servants or employees of a common master or employer, and one of them, from the negligent act of the other, receives injury, the master is not liable for the same, because when a servant enters the service of a master he assumes and runs the risks and dangers incident to the service, and it is unreasonable that he should call on the master to make good to him all damages that may befall him from the acts of any and of all fellow-servants in the employ of the master. This doctrine originated in South Carolina in 1841, and was followed in Massachusetts in 1842, and was first held in England in 1850. *Murray v. Co.*, 1 McMullen (S. C.), 385, 36 Am. Dec. 268, 279, and note. The process of the evolution of this doctrine of fellow-servantcy has been a remarkable one, in the fact that it has engendered a discussion in all the courts of the land on frequent occasions, and has caused a woeful conflict of authority in innumerable cases, and he who undertakes to examine it will be wearied in mind, and almost hopeless of extracting from text-books and decisions any certain, definite rule upon the subject. The difficult question is, Who are fellow-servants? Necessity calls for some test or rule generally applicable in the multitudinous cases everywhere; and a principle of justice here presents itself furnishing that rule, putting on the master liability, when he should bear it, and leaving with the servant the misfortune where he should bear it. That principle logically says that we must look at the act negligently done causing the injury, and if the performance of that act is a duty which the master is required by law to do properly, then he is liable, whether he negligently do the act himself or through another as his servant; but if it is not an act of duty imposed by law upon the master, but one purely the duty of another servant to do properly, both for the benefit of his master and of his fellow-servant, the master is not liable. I repeat that it depends on the

character of the act negligently done. Is it a duty of the master to the servant? We must therefore see what duties the master owes to the servant. These duties are well summed up according to the received law in *Madden v. Railway Co.*, 28 W. Va. 617, as follows: First, to provide safe and suitable machinery and appliances for the business. This includes the exercise of reasonable care in furnishing such appliances, and the exercise of like care in keeping the same in repair and making proper inspections and tests. Second, to exercise like care in providing and retaining sufficient and suitable servants for the business. Third, to establish proper rules and regulations for the service, and having adopted such, to conform to them. All the foregoing duties, it will be observed, are included in the one general duty of the master to provide a safe plant. The law is well settled that the master is not required to be a guarantor or insurer in this behalf; but is only required to employ reasonable and ordinary care in selecting what he requires and is necessary for his business. I will add that he must furnish a safe place in which his servant is to work.

The doing of these things is a duty of the master to the servant for the latter's safety. The master can either perform these duties personally, or he may delegate their performance to some one else, whom the books call vice-principal, because he stands as to these duties in the place of his master; but if either fails in the performance of duty in any of these respects, and damage results to a servant, the master must answer. If, however, the damaging negligent act is not one of the things which rest on the master as a duty to the servant, it is the act purely of a fellow-servant, and the injured servant must look to him, not to the master. These duties falling on the master to perform are called in the law books non-assignable duties, because he owes them to the servant, and he cannot assign them to another to perform and exempt himself from liability for their misperformance. These duties are sometimes spoken of as duties in construction, preparation, and preservation, as contrasted with mere work of operation. For instance, the construction of the railroad or other work, the preparation of machinery and implements to be used in the business, the preservation of the track or working place, or machinery and appliances in proper, safe condition, and the selection of proper servants to work. The master having well done his duty in these things, their handling and use in the prosecution of the work designed is a work of mere operation, and this work the servants must perform well in the interest of their master and fellow-servants, and if one fails to do so, and injures a fellow-servant, the master is not liable, since he cannot always stand by and watch the

servant in his every act in the carrying on or operation of the business, and the law of necessity permits him to commit this work of mere operation to other hands. To illustrate: the employer must furnish a good wagon, railroad car, or brake or mowing machine, and failing herein to the injury of his employee using them in ignorance of deficiency, he must repair the injury; but, having them, if one servant by their careless use injures a fellow-servant, the master is not to repair his injury. For the misuse of these things by a servant the master would be liable to strangers, but not to another servant, because when he entered upon the service he assumed the risks and dangers that might occur in the business, among them the danger that he might receive injuries from the negligence of a fellow-servant. It would be unjust to make the master an insurer of every servant against the negligence of every act of other servants, in many instances numbering thousands, working over hundreds of miles or a wide area of territory, the master necessarily himself absent. What man or corporation engaged in any business could endure such danger and burden? It would be a crying injustice to the farmer, merchant, coal operator, railroad or steamboat company—to all business operators. The law is severe enough in holding employers responsible for good track, machinery, etc., as above stated, without making them guarantors for the acts of every servant. You cannot make the master liable for an act of mere operation, no matter by what servant done; you cannot exempt him for an act not one of mere operation, but of his personal duty, though done by any servant. If he does the act in person, he is liable, regardless of the character of the act. 1 Whart. Neg. sec. 205; Beach, Contrib. Neg., secs. 302-3. This is the rule of reason and justice. It is supported by the great volume of authority in text writers and decisions. But another rule has been followed to a very considerable extent, known as the rule of "superior servant;" that is, where the negligent servant is in grade of employment superior to the injured one, or where one servant is placed by the master in a position of subordination, and subject to the orders and control of another in such a way and to such an extent that the servant so placed in control may reasonably be regarded as representing the master, as his *alter ego*, or vice-principal, and the inferior servant is injured by the negligence of the superior servant, the master is liable. This rule, as McKinney on Fellow Servants, sec. 43, says, has produced endless confusion, and is favored by many text-writers, and adopted by the Southern and Western courts, and by the United States Supreme Court; but, on the other hand, the entire doctrine of the liability of the master for a superior servant's tort to an inferior is

repudiated by courts whose number and authority outweigh those favoring the doctrine. But since Mr. McKinney wrote that rule has been overthrown by a change in the Supreme Court of the United States, whose decision in the case of *Chicago, etc. Co. v. Ross*, 112 U. S. 377, has been the parent of much erroneous decision upon this subject. That case held that a conductor was a vice-principal, standing in the shoes of the master, because given authority and control over his train and of other employees on it, to direct and order them, and was thus a superior servant, clothed with the authority of the master, and that his negligent act, injuring other servants, rendered the master liable, because he was a superior servant. This doctrine did not render the question of the master's liability or non-liability dependent on the true principle, that is, an inquiry whether the act performed by the conductor was a duty of the master to other servants, or one of mere conduct or operation of the business, but the simple fact that he controlled the train and could direct and order other servants made the master liable, although it is plain that the conductor did only his part in the mere management and operation of the train along with brakemen and other trainmen. It made the grade or control of the conductor, because in some respects superior, the controlling element. Mr. Bailey, in his work on *Master's Liability for Injury to Servants* (page 239), says that in the *Ross* case a wide departure from the true principle was made, and that perhaps no decision of that court created greater surprise in the profession; that its influence had been wide, many States, after years of uncertainty, adopting its rule as the correct solution of a vexed problem, and that it was prophesied by many jurists and lawyers that this doctrine would be temporary and of short duration; that it was rendered by a divided court, five to four, and the reasoning of the court not satisfactory. That prophesy of its short duration was not long in being realized. In *B. & O. R. R. Co. v. Baugh*, 149 U. S. 368, it was virtually repudiated, being limited to the particular facts of the *Ross* case, and held not a rule of general application. The court said that "so far as the matter of the master's exemption from liability depends upon whether the negligence is one of the ordinary risks of the employment, and thus assumed by the employee, it includes all co-workers to the same end, whether in control or not. But if the fact that the risk is or is not obvious does not control, what test or rule is there which determines? Rightfully this: there must be some personal wrong on the part of the master: some breach of positive duty on his part. If he discharges all that may be called positive duty, and is himself guilty of no neglect, it would seem as though he was

absolved from all responsibility, and that the party who caused the injury should be himself alone responsible." The court quotes with approval the opinion of the Supreme Court of Kansas, as furnishing the true rule: "A master assumes the duty towards his servant of exercising reasonable care and diligence to provide the servant with a reasonably safe place at which to work, with reasonably safe machinery, tools, and implements to work with, with reasonably safe materials to work upon, and with suitable and competent fellow-servants to work with him; and when the master has properly discharged these duties, then, at common law, the servant assumes all the risks and hazards incident to or attendant upon the exercise of the particular employment or the performance of the particular work, including those risks and hazards resulting from the possible negligence and carelessness of his fellow-servants and co-employees. And at common law, whenever the master delegates to any officer, servant, agent, or employee, high or low, the performance of any of the duties above mentioned, which really devolve upon the master himself, then such officer, servant, agent, or employee stands in the place of the master and becomes a substitute for the master, and the master is liable for his acts or his negligence to the same extent as though the master himself had performed the acts or was guilty of the negligence. But at common law, where the master himself has performed his duty, the master is not liable to any one of his servants for the acts or negligence of any mere fellow-servant, or co-employee of such servant, where the fellow-servant or co-employee does not sustain this representative relation to the master." The court said: "*Prima facie*, all who enter into the employ of a single master are engaged in a common service and are fellow-servants, and some other line of demarcation than that of control must exist to destroy the relation of fellow-servants."

In the later case of *N. P. R. R. Co. v. Hambly*, 154 U. S. 349, a day laborer of the company working on a section force was held a fellow-servant of an engineer and conductor of a passenger train, and it was held that that laborer could not make the company liable for the negligence of the engineer or conductor. Justice Brown there shows that the law, as between laborers upon a railroad track and the conductor or other employees of a moving train, the courts of most of the States regard as fellow-servants, but in some otherwise. This case is contrary to the *Ross* case and overrules it. In the latter case of *Central R. R. Co. v. Keegan*, 160 U. S. 259, it was held that one of a force of men in the service of a railroad company, employed in coupling and uncoupling cars under the orders of one of them, receiving an injury from the negligence of the boss, could

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not hold the company liable, because the boss and he were fellow-servants. The court repeats the rule that the rightful test is whether "the negligent act constituted a breach of positive duty owing by the master, such as that of taking fair, reasonable precautions to surround his employees with fit and careful co-workers, and furnishing a reasonably safe place to work, and reasonably safe tools and machinery, thus making the question of liability of an employer for an injury to his employee turn rather on the character of the alleged negligent act than on the relations of the employees to each other, so that if the act is one done in the discharge of some positive duty of the master to the servant, then negligence in the act is the negligence of the master; but if it be not one in the discharge of such positive duty, then there should be some personal wrong on the part of the employer before he is liable therefor." And, in the still later case of *N. P. R. R. Co. v. Peterson*, 162 U. S. 346, the court carefully and pointedly reviews this subject, and lays down the doctrine that a foreman of a gang of laborers, having in charge the superintendence of the gang in working, with power to hire and discharge hands, and exclusive charge of their direction and management in their employment, is a fellow-servant, in fact and law, with others of the gang, and that the company is not liable for an injury received by one of them from the negligence of the foreman because of their fellow-servantcy. The court went on to define the duties of a railroad company as master towards its employees, and says that "the general rule is that those entering into the service of a common master become thereby engaged in a common service and are fellow-servants, and, *prima facie*, the common master is not liable for the negligence of one of his servants which has resulted in an injury to a fellow-servant. There are, however, some duties which a master owes, as such, to a servant entering his employment. He owes the duty to protect such servant with a reasonably safe place to work in, having reference to the character of the employment in which the servant is engaged. He also owes the duty of providing reasonably safe tools, appliances, and machinery for the accomplishment of the work necessary to be done. He must exercise proper diligence in the employment of reasonably safe and competent men to perform their respective duties, and it has been held in many States that the master owes the further duty of adopting and promulgating safe and proper rules for the conduct of his business, including the government of the machinery and the running of trains on a railroad track. If the master be neglectful in any of these matters, it is a neglect of a duty which he personally owes to his employees, and if the employee suffer damage on

account thereof, the master is liable. If, instead of personally performing these obligations, the master engages another to do them for him, he is liable for the neglect of that other, which, in such case, is not the neglect of a fellow-servant, no matter what his position as to other matters, but is the neglect of the master to do those things which it is the duty of the master to perform as such. In addition to the liability of the master for his neglect to perform these duties, there has been laid upon him by some courts a further liability for the neglect of one of his servants in charge of a separate department or branch of business whereby another of his employees has been injured, even though the neglect was not of that character which the master owed in his capacity as master to the servant who was injured. In such case it has been held that the neglect of the superior officer or agent of the master was the neglect of the master, and was not that of the co-employee, and hence that of the servant, who was a subordinate in the department of the officer, could recover against the common master for the injuries sustained by him under such circumstances." The syllabus in that case says:

"The previous cases in this court on this subject examined, and found to determine the following points as to the liability of a railroad company for injuries to an employee alleged to have been caused by the negligence of another employee while the injured person was in the performance of his ordinary duties:

"1. That the mere superiority of the negligent employee in position and in the power to give orders to subordinates is not a ground for such liability.

"2. That in order to form an exception to the general law of non-liability, the person whose neglect caused the injury must be one who was clothed with the control and management of a distinct department, and not of a mere separate piece of work in one of the branches of service in a department.

"3. That when the business of the master is of such great and diversified extent that it naturally and necessarily separates itself into departments of service, the persons placed by the master in charge of these separate branches and departments and given control therein may be considered, with reference to employees under them, vice-principals and representatives of the master as fully as if the entire business of the master were placed by him under one superintendent."

On these principles in the case of *N. P. R. R. Co. v. Charless*, 162 U. S. 359, it was held that a laborer in a gang riding on a hand car over the road to inspect the road, injured by a collision with a freight train, could not recover from the company for negligence of its

servants on the freight train to give signals of its approach, because those servants were fellow-servants, nor could he recover for negligence of the foreman in running the hand car at too high a rate of speed, because he, too, was a fellow-servant with the injured party. Thus the Supreme Court has recalled its departure from the true rule, and now leads in the announcement of the true rule in these repeated latest decisions. That the Ross case was overruled in the Baugh case is admitted in the Baugh case in the dissenting opinion of Justice Field, who wrote the opinion in the Ross case. It must not be supposed that the Supreme Court in these cases was acting on the legal decisions in the States from which the cases came, for in the Baugh case it is expressly ruled that it was a question of general, not local, law, and the principles enunciated were those of the general and not local law.

After completing, but before delivery of this opinion, I discover that on 15th February, 1897, the United States Supreme Court, in *Oaks v. Mase* (1 Am. Neg. Rep. 544), held that "an engineer on one train is a fellow-servant with a conductor on another on same road," citing the four cases I cite above, thus adhering to their doctrine. Only one judge dissented.

I believe this doctrine, as an original proposition, correct. However, if the highest court in the land, upon this question, arising, not in one State, but daily in every State, had not changed its rulings, as our former cases followed it, I should not favor a departure from those cases. But how can we stand out against that court in its latest position upon a question in which there ought to be uniformity of decision, approved, as it is, by the most numerous and best text-writers? The Federal courts in this State will follow it, as they are doing elsewhere. *Cleveland, etc. v. Brown*, 73 Fed. Rep. 970; *Balch v. Haas*, Id. 974, both Circuit Court Appeal cases. Why, in the same State, shall we have clashing rulings on exactly the same subject?

I have just met with the opinion by Judge Goff in the Virginia case of *Thom v. Pittard*, 8 U. S. App. 597, holding that a foreman engaged on a work train in hauling material for repair of road, who acted as conductor and was foreman of the gang of laborers under him, and a section master having men under him employed in keeping the roadbed and track in order, and who used for that purpose a portion of the load on the work train, were fellow-servants with the laborers under them. I refer to Judge Goff's opinion as harmonizing in substance and spirit with the principles above stated by me. See Mr. McKinney's note of satisfaction at the change of position by the Supreme Court in 54 Am. & Eng. R. R. Cases, 364.

That latest and invaluable work on railroads, issued this year in four volumes, Elliott on Railroads, in sec. 1330 criticises the Ross case as having brought error into some of the decisions, and in sec. 1333, having since seen the decisions in the Peterson case and the Charless case, says that they "deny much of the doctrine asserted in the Ross case, and assert a rule which is in line with that asserted by most of the State courts." Elliott says, in sec. 1276, that if the duty be of a nature that is assignable, one of mere operation, not resting upon the master, he is not liable. In other words, the right to assign or delegate a duty conclusively implies that the duty is not that of the master in such a sense as to render him responsible for negligence in its performance.

The Supreme Court of Virginia has recently reviewed all the Virginia cases on this subject and follows the Supreme Court in the Hambly case cited above, in *Norfolk, etc. R. R. Co. v. Nuckols*, 91 Va. 193, holding that the liability of the master does not depend upon gradations in employment unless the superiority of the person causing the injury was such as to put him in the category of principal or vice-principal, and laying down as the true rule that above stated in this opinion, holding that the test is that where the departments in which the negligent and the injured persons labor are so far separated from each other as to exclude the probability of contact and of danger from the negligent performance of their duties by employees of the different departments, then the servant is not taken to have contemplated such danger from the other servant in another department, as one incident to his employment when he entered the service, but that the mere fact that the servant injured is in another department of service does not render the master liable.

The rule above stated has the approval of other great text-writers: Bishop on Non-Contract Law, secs. 665, 671, 672, 673; Judge Dillon gives it his emphatic approval as the only true rule in 24 Am. Law Rev., 175, quoted in opinion in *Ell v. N. P. Co.* (N. Dak.) 26 Am. St. R. 627. That case holds the rule that the character of the act, not the grade of the servant, governs. The opinion by Corliss, C. J., is a very strong and clear discussion of the subject. 36 Am. Dec. 279; *New Pittsburgh, etc. v. Peterson* (Ind.) 43 Am. St. R. 327.

Now let us turn to the West Virginia cases. So far as they define the general rule I think they are in harmony therewith, though in some instances the rule has been misapplied in making persons vice-principals who were only fellow-servants. *Riley v. Railway*, 27 W. Va. 145, recognizes that to make the master liable for the acts of his servant that act must relate to the discharge of some duty which the master owes to the employee. So in point 3 of *Madden v. Co.*,

28 W. Va. 610. So, as I understand it, is the general principle stated in *Daniel's Admr. v. Railway Co.*, 36 W. Va. 397, and in *Core v. R. R. Co.*, 38 W. Va. 456. Such is the general principle, but it is often difficult to apply, to say whether the particular act is one of the duties placed upon the master for the benefit of his servants, and so one that is non-assignable, for which the master is ill liable, or one of mere operation. Now, our cases of *Madden v. Co.*, *supra*, *Daniel's Admr. v. Co.*, *supra*, and *Haney v. R. R. Co.*, 38 W. Va. 570, holding that a conductor is a superior servant or vice-principal, and not a fellow-servant with other employees, spring from the *Ross* case, and, I am compelled to say, are not sound in principle. I have always entertained, myself, a different opinion from those cases, but thought the *Madden* case governed us. The prop has fallen from under those decisions. We ought to be right. The Supreme Court has reversed itself. Why should not we do so? It is not a rule of property.

Why is not a conductor a fellow-servant with other servants on that or any other train? He is not the head of another department, nor working in another separate department, so as to enable us to say that the injured servant did not contemplate the negligence of the conductor as one of the dangers which he might have to encounter.

The conductor is simply an operative, he simply carries on the work of actual operation; he uses the track and cars provided by the master for the transaction of his business, just as the engineer and fireman use the engine and the brakemen use the brakes. His functions are purely those of mere operation. As stated above, he is not in another separate department from other servants on his train, nor performing the work of a separate department, but simply a particular piece of work in the operating department. His mere superiority or power of control in some respects cannot take him out of that classification or category. Most eminent authority positively settles this. The Supreme Court of the United States so held. Would you say that when the farmer, mine owner, or lumberman sends a lot of hands upon his work in charge of a foreman, or boss, or overseer, call him as you may, he is to indemnify them against the every mistake of the foreman while doing the work? That would make every business very perilous. If not in such case, why should a railroad company be made to indemnify when it sends a lot of trainmen to run its train under the control of a conductor? It must employ a competent conductor, but not be required to insure against his error of judgment. You cannot do so unless you change the rule laid down in this court and elsewhere, that it is the character of the act, not the grade or

control of the foreman, that ought to guide. I think an excellent test is put in the last clause of the syllabus in *Valtez v. Ohio*, etc., 85 Ill. 500: "Those who are engaged in the service of the same master in carrying on and conducting the same general business, in which the usual instrumentalities are employed, may be justly called fellow-servants. A proper test of this relation is, whether the negligence of the one is likely to inflict injury on another." This means that if one may chance to be hurt from the negligence of another, he is deemed to have contemplated and risked that chance when he entered service, and they are fellow-servants. May not a brakeman assume a chance of danger from mistakes of a conductor?

The latest railroad law work, Elliott on Railroads, sec. 1330, says: "There is comparatively very little conflict upon the question as to whether trainmen engaged in operating the same train are fellow-servants, the very decided weight of authority holding them to be fellow-servants. This seems to us the only rule that can be defended on principle, for such employees are in the strictest sense engaged in the service of a common master; their service is of the same general character, and the object of the service is a common one. The doctrine declared in a case decided by the Supreme Court of the United States has created some conflict, and, as we venture to say, brought error into some of the decisions, but the case to which we refer cannot be regarded as expressing the rule which now prevails in the Federal courts. We cannot perceive how the doctrine which declares that employees of the same train are not fellow-servants can be upheld without violating the principle that the details of operating a railroad do not pertain to or form part of the master's duty. Under the rule which we have stated, conductors, engineers, firemen, brakemen, and baggage-masters of the same train are fellow-servants. There are cases which apply what is sometimes called the 'doctrine of subordination' to trainmen performing service on the same train. Conductors are usually considered, in the line of decisions just referred to, as superiors, and not as fellow-servants, for which heresy the *Ross* case, so often referred to, is to a great extent responsible." (In the section of Elliott afterwards written, it is shown that the *Ross* case has been overruled, as above stated). Elliott, in sec. 1331, says: "It seems to us that the rule must be the same whether the trainmen are engaged on the same train or on different trains. There is, as we think, no valid reason for discriminating between cases where the employees are engaged in operating the same train and cases where they are engaged in operating different trains. In both cases they are employed in the

same line of service, and by a common master. The weight of authority preponderates very strongly in favor of the doctrine that trainmen, although employed on different trains, are fellow-servants, but there is some conflict of authority upon the question." I cite the case decided in 1895, of *Wooden v. Railroad Co.*, 147 N. Y. 508, holding conductor and other trainmen to be fellow-servants. Note 7, Am. & Eng. Ency. L., 870; also *Dow v. K. P. Co.*, 8 Kan. 642; *Jenkins v. Richmond and Danville R. R. Co.* (S. C.), 39 Am. St. R. 750; *Baltimore Elevator Co. v. Neal*, 65 Md. 438; *Knahtla v. Oregon, etc. R. Co.*, 21 Ore. 136, and cases cited, 148; *Heine v. Chicago, etc.*, 58 Wis. 525.

I therefore put it as sound law that as the question of fellow-servancy depends on the character of the act, the grade or rank of the negligent and injured servant, or whether one had authority or control over the other, is immaterial, and that this rule is supported by the better reason and the latest and best authority of text-writers and court decisions. In addition to those cited above I cite 3 Wood, Rail. 1788; 3 Elliott on Rail. sec. 1316; Wood, Mast. & Serv. sec. 448; Story, Agency, sec. 453; Webb's Poll. on Tort, 121; 7 Am. & Eng. Ency. L., 834; *Hankins v. N. Y. Co.*, 142 N. Y. 416, 40 Am. St. R. 616; *McElligott v. Randall* (Conn.), 29 St. R. 181; *Galveston, etc. v. Smith* (Tex.), 16 Am. St. R. 76; *Harrison v. Detroit* (Mich.), 19 Am. St. R. 180; *New Pittsburgh, etc. v. Peterson* (Ind.), 43 Am. St. R. 327; *Mobile, etc. v. Smith*, 59 Ala. 245; *Same v. Thomas*, 42 Id. 672; *Jenkins v. Richmond* (S. C.), 39 Am. St. R. 750; Mech. on Agency, sec. 668; *N. & W. R. R. Co. v. Donnelly*, 88 Va. 853; *Avery v. Meek*, 96 Ky. 192. I quote in this connection, as very strong, the language of the eminent Judge Cooley, in *Cooley on Torts*, 639: "In some quarters a strong disposition has been manifested to hold the rule (of fellow-service) not applicable to the case of a servant who, at the time of the injury, was under the general direction and control of another, who was intrusted with duties of a higher grade, and from whose negligence the injury resulted. But it cannot be disputed that the negligence of a servant of one grade is as much one of the risks of the business as the negligence of a servant of any other, and it seems impossible, therefore, to hold that the servant contracts to run the risks of negligent acts or omissions on the part of one class of servants and not those of another class. Nor, on grounds of public policy, could the distinction be admitted, whether we consider the consequences to the parties to the relation, exclusively, or those which affect the public, who, in their dealings with the employer, may be subjected to risks. Sound policy seems to require that the law

should make it for the interest of the servant that he should take care not only that he be not himself negligent, but also that any negligence of others in the same employment be properly guarded against by him so far as he may find it reasonably practicable, and be reported to his employer if needful, and in this regard it can make little difference what is the grade of the negligent servant, except as a superior authority may render the negligence more dangerous."

The Supreme Court of Indiana in *New Pittsburgh, etc. v. Peterson*, 43 Am. St. R. 332, says, as I say myself, that this rule of fellow-servantcy is founded in wisdom, and departure from it dangerous to the prosperity and perpetuity of enterprises of mining, manufacturing, railroading, and those industries requiring the services of many employees; and departure from it would increase the danger of employees themselves, as it inspires diligence and watchfulness to save themselves and co-laborers, as well as their employers. Abandon the rule, and inducement to care is gone, and each workman has nothing to do but look out for his own safety. This doctrine is indispensable in our days of numberless enterprises operating with innumerable employees and machines and appliances. This doctrine, that where the faulty servant is a superior servant having authority over the injured one, arose in Ohio in *Little M. Co. v. Lewton*, 20 Ohio, 415. The court became dissatisfied with it in *Pittsburgh, etc. v. DeVinney*, 17 Ohio St. 197, and refused an action by a brakeman against the railroad for negligence of a conductor on another train. The dissenting judge said it was a departure from the former decision. He admitted that the rule of the *Little Miami* case was contrary to the rule outside Ohio, "that a servant, without regard to his grade of authority or position, cannot maintain an action against his employer for the fault of a fellow-servant." The former case allowed action by engineer for negligence of the conductor on same train. The dissenting opinion in the *Little Miami* case is very elaborate and strong in support of the true rule. From *Avery v. Meek*, 96 Ky. 192 (September, 1893), the Kentucky court seems to qualify its former holding by saying, after admitting that the rule in a majority of States is as above given, that one servant cannot recover for negligence of a servant superior in authority unless it be gross. An unreasonable distinction. It may be that *Allen v. Goodwin*, 92 Tenn. 385 (March, 1893), shakes the former rule in that State. 1 Bev. on Neg., 835, states the English rule to be that at common law "a master is not liable to any servant for any injury which arises from the act or default of any fellow-servant, whether that fellow-servant be in a position of authority or not."

For these reasons I think that Jackson and Gilbert were fellow-servants.

There is another feature of this case strengthening the position, though not necessary to its support, that they were such fellow-servants, in this: Suppose that a conductor, in his own line of duty, is a vice-principal, as he is not, yet here he was performing simply the work of a brakeman in waving to the engineer. Plainly this was an act of mere operation of the cars by hands, not a duty of the company. In *Deep Mining Co. etc. v. Fitzgerald* (Colo.), the opinion said that "When the manager or vice-principal undertakes work in simple co-operation with other servants, and upon precisely the same footing with them, he becomes, for the time being, a mere fellow-servant with them, acting as such. Thus, for example, a conductor, while acting as such in starting or delaying a train, in warning or failing to warn the other hands, or in any respect performing the usual duties of a conductor, is not, under the American rule, a fellow-servant with a brakeman on the same train. But when he offers to assist the brakeman in handling his brakes or in coupling cars, he acts only as a fellow-servant, such work being no part of the duty of a conductor as such." "If the negligence complained of (that is, the negligence of the vice-principal) consists of some act done or omitted by one having such authority which relates to his duties as a co-laborer with those under his control, and which might just as readily happen with one of them having no such authority, the common master will not be liable." "The better rule, as we extract it from the best-reasoned cases, is that for the acts of the vice-principal done within the scope of his employment, and such as properly devolve upon the master in his general duty to its servants, the master is liable, while for all such acts as relate to the common employment, and are on a level with the acts of the fellow-laborer, except such acts done by the vice-principal against the reasonable objection of the injured servant, the master is not responsible. In other words, the test of liability is the character of the act, rather than the relative rank of the servants." See 26 Am. St. R. 622, 625; *Green, J., Criswell v. Railway Co.*, 30 W. Va. 814; *Core Co.*, 38 Id. 456; *Rodman Co.*, 17 Am. & Eng. R. R. Cas. 521, 3 Elliott on Rail. sec. 1319. This position may not be so clear, for if the conductor be vice-principal, then the act is as if done by the master in person, and no matter what the character of that act, one of mere operation or not, if done by the master in person, he is liable. So held in *Berea Stone Co. v. Kraft*, 31 Ohio St. 289; 27 Am. R. 510.

It is said in argument that the declaration is bad because it does

not negative the idea that the injury emanated from the act of a fellow-servant. It charges that the cars were "by the wrongful and negligent acts of the defendant company, its agents, servants, and employees, wrongfully, carelessly, violently, and negligently precipitated on and against said infant plaintiff." I do not think that the declaration need allege the position of the negligent servant or show affirmatively that he was not a fellow-servant. In some States such would be required, but in this State it is sufficient to charge generally the act as having been negligently done, without negating the fellow-servantcy, just as it is settled in this State that such a general charge of a negligent act is sufficient, without negating contributory negligence.

CONTRIBUTORY NEGLIGENCE. — This debars the plaintiff from recovering. He says that he was attempting to couple to some cars standing on the track a train composed of an engine and six or seven loaded coal cars, which was being backed up to the standing cars. He says the cars came together without coupling, and did not couple, and he then waved the engineer down, and the train separated from the cars a distance of six feet, and there stood, and that he went in to couple the cars, and that Gilbert, standing on the car of the moving train above him, instead of waiting for Jackson to signal the train to back again, himself signaled it and brought the train too quickly back, and caught his arm in between the bumpers and mashed his arm from the wrist to the elbow. Now, Gilbert denies having given any signal, but says Jackson did so. Gilbert and two other witnesses in their evidence substantially show that Jackson signaled the train to back, and that it did not stop before Jackson received his injury. The features of the case seem to show that Jackson signaled the train, and by carelessness, or want of that great caution and prudence conforming to the usage of brakeman, received the injury. The cars were on a sharp curve. He went between them on the inside of the curve, thus endangering himself from being pinched by the corners of the cars, whereas he should have gone in, under the practice of brakemen, on the outside of the curve, and the bumpers would there have saved him from any accident if he had not placed his hand directly between the bumpers, contrary to the rules of brakemen and the plainest principles of self-preservation. Being on the inside of the curve, to avoid being pinched at the corner he would naturally press too close to the bumpers, and the more likely injure himself, whilst on the other side he could have stood a considerable distance from the bumpers and been safe. But, at any rate, why should he have had his whole forearm directly in front of the bumpers, when, as he and all others

show, in coupling the arm should be below those bumpers, simply taking hold of the link, directing it so as to enter the drawbar of the car? The bumpers are made for the very purpose of bumping against each other and keeping the cars from coming closer together and saving the brakeman. He did a thing of manifest danger, dispensed with the use of the appliances prepared by the employer to save him by placing his arm in the very place where it would surely be caught, without call for so doing. At no time, under no circumstances, had he right or need to put his arm there. A man engaged in such dangerous work is bound to use the most astute caution and care. He was an experienced brakeman.

Now, let us discard the idea that Jackson waved the train back, and say that Gilbert did that. It may be said that Jackson was not expecting the conductor to wave the train back, but to give the signal himself, and therefore did not have his arm in the right place. He says that when the cars first came together they would not couple. Then he waved the engine down and went in to make the coupling, the conductor standing on the car above him, and "as I aimed to make the coupling, he, the conductor, waved the engineer back, and I saw him and aimed to jump back, but before I could do so the cars caught me," using his own words. Now the backing train was six feet off. Jackson says he saw the conductor wave the train back. Then he had time to get out or to properly place his arm and hand under the bumpers, for he and all say that the train had seven loaded coal cars to back up a very steep grade on reverse curves, the track slippery, having to sand it, the engine slipping, and the movement very slow. Jackson complains that the conductor waved the train back before he was ready for it, yet he says he saw him wave, and surely he could prepare or get out while this loaded train was starting and going the six feet in its very slow, labored movement. All the evidence shows that the engine could scarcely back its cars up that steep grade and sharp curve. He had timely warning to take his arm away. It should never have been there. Gilbert denies waving the train back, and it looks like Jackson did, because if he had, we would expect him, after doing so, to be in between the cars to couple them, but if he had not given the signal, hardly so. Say, however, that the conductor did wave the train back, and that Jackson did not see him, though he says he did, it is scarcely possible that with a lantern Jackson would not see the train start its movement and come back soon enough to get out of the way or prepare for it. So we can say that he did not use that care and caution required in such dangerous business. Is it justice, between man and man, to hold the employer liable under such

circumstances? Had it not been for the negligence of Jackson in a place calling for the most watchful prudence, the misfortune would not have happened.

Reversed and new trial granted.

ENGLISH and McWHIRTER, JJ., concurred.

DENT, J., dissented.

WINKLER v. FISHER.

Supreme Court, Wisconsin, February, 1897.

MASTER AND SERVANT—SCOPE OF EMPLOYMENT.—Where it appeared that the defendant directed his son to shoot crows in a field, but instead the son went into the woods to hunt squirrels, and when about two miles from defendant's house the plaintiff was injured by the negligent discharge of the gun by the son, the defendant was not liable, as at the time of the accident the son was not engaged in his father's employ.

APPEAL from judgment, Circuit Court, Waupaca County, in favor of plaintiff. William Fisher, a son of defendant, about sixteen years of age, while on a hunting expedition with a companion, stopped at the residence of Mr. Mack, to procure a string to tie together some squirrels that they had killed. There were several persons sitting on the steps of the porch and the plaintiff was sitting on a barrel at the end of the steps. Fisher's companion went into the house to get the string, leaving Fisher outside leaning on his gun. He was about sixteen feet from the plaintiff. When the companion came out of the house, both boys prepared to depart, and as they did so the Fisher boy picked up his gun by the muzzle and swung it over his head for the purpose of resting it on his left shoulder, but in making such movement the gun fell from his hands and went over his left shoulder onto the ground and was discharged. A shot struck some hard substance from which it was deflected and struck plaintiff in the eye, causing the injury for which this suit is brought. The complaint alleged negligence on the part of the boy in handling the gun, and that the defendant was liable therefor by reason of the relation existing of master and servant. The jury rendered a verdict for the plaintiff.

FELKER, GOLDBERG & FELKER, for appellant.

CATE, JONES & SANBORN, for respondent.

MARSHALL, J. (after stating the facts.)—The master is liable for the negligent acts of his servant within the scope of the latter's employment. If the servant steps aside, however, from his master's

business, though but temporarily, to do some act outside the business of his master, the relation of master and servant during such time is suspended; and, whatever the latter does during such time, the consequences are not chargeable to the former. 14 Am. & Eng. Enc. Law, 809. That sufficiently states the law applicable to this case, and the jury was so substantially instructed by the court. Under such instructions, on the evidence, they found specially that the Fisher boy, on the day of the accident, was employed by defendant to shoot crows, at ten cents apiece, and that he was in defendant's employ under such contract, and acting within the scope of such employment, at the time of the accident. Such finding is challenged as contrary to the law and the evidence, which raises the principal question of our consideration.

The evidence tends to show that, on the morning in question, defendant told his son to go into the field and shoot crows, whenever he had spare time, and that defendant would give him ten cents apiece for all he would kill; that, on the day previous the two boys arranged to go hunting; that, pursuant to such arrangement, they started out about twelve o'clock, and went from place to place, through the woods, wholly outside defendant's farm, for the purpose of shooting game other than crows; that, up to about four o'clock, in the afternoon, they had killed two squirrels, at which time they were about two miles from defendant's house, and in the vicinity of Mack's house. Then they agreed to go through a piece of woods back of the latter's house, and from there home. At the suggestion of the Seeber boy, they stopped at Mack's house to get a string to tie the squirrels together. After the string was procured, and as they started to leave, and just before the accident happened, the Fisher boy said: "We must be going, or we will not get many crows. Father offered us ten cents apiece for all the crows we would kill to-day." Such, in substance, is the evidence bearing on the question of the relation between defendant and his son at the time of the accident. We fail to find any evidence tending to show that during the day the boy had been hunting crows in his father's field or elsewhere, under contract with the latter or otherwise, or that he was, at the time of the accident, in his father's employ, hunting, and his servant for such purpose in any sense whatever. The verdict of the jury to the contrary clearly is unsupported by the evidence; and the judgment must be reversed, and a new trial granted, for that reason. The judgment of the Circuit Court is reversed, and the cause remanded for a new trial.

McMAHON v. IDA MINING COMPANY.

Supreme Court, Wisconsin, February, 1897.

FELLOW-SERVANTS.—The "shift boss" of a mine is not the co-employee of a miner who is directed by the shift boss to work at a certain place where there were unexploded blasts unknown to the miner and known to the boss.

APPEAL from judgment of nonsuit, Circuit Court, La Fayette county. The action was for damages for injuries received by the appellant while at work as a miner in the respondent's lead and zinc mine, by the discharge of a dynamite blast. It appeared that the shift boss, whose duty it was to direct the men in the mine where to work, directed the appellant and another to work at a place where a blast had been exploded, but three of the holes that had formed part of the blast were still unexploded, known to the boss. The fellow-workman of the appellant heard the boss say that two of the holes were still unexploded, but the appellant testified that he did not hear it. The two men found two holes with wires sticking out of them, which was a sign of unexploded blasts, and they fired them. The testimony tends to show that there were no other holes with wires sticking out of them. The two workmen found a hole without a wire sticking out of it, and concluded that it had been fired without result and proceeded to scrape out the contents of it so far as possible, and finding it in the proper place for a blast, started to drill it deeper. This hole was, in fact, the hole containing the unexploded blast. After drilling for a time, the dynamite in the hole exploded, seriously injuring plaintiff.

The plaintiff was nonsuited.

J. B. SIMPSON and ORTON & OSBORN for appellant.

SPENSLEY & McILHON and ALDRO JENKS, for respondent.

WINSLOW, J.—The nonsuit is attempted to be justified on the ground that the shift boss was a co-employee, and that thus the plaintiff's injury resulted from the negligence of a co-employee. There is little or no dispute as to the principles of law on the subject, but the difficulty is in the application of the law. In *Cadden v. Barge Co.*, 88 Wis. 409, 60 N. W. 800, it is correctly said: "In *Dwyer v. Express Co.*, 82 Wis. 307, 52 N. W. 304, it was held that the question whether different employees of the same master are to be regarded as fellow-servants in a common employment depends upon the nature of the act in the performance of which the injury

was inflicted, without regard to the rank of the negligent servant, and that the master is not liable unless the negligent act pertained to a matter in respect to which he owed a direct duty to the servant injured." So the question here is simply whether the shift boss, Cadden, in sending the plaintiff to work in a new part of the mine, where there was a concealed danger, of which he (the shift boss) knew, but the plaintiff did not, was performing a duty of the master. A master is bound to furnish the servant a reasonably safe place in which to work, considering the nature of the work. He is not to set a man at work among latent and extraordinary dangers, of which the employee knows nothing, and cannot ascertain by experience or observation. In taking the plaintiff from one part of the mine in which he had been at work, and setting him at work in a different place, the shift boss was plainly and palpably acting in the capacity of master. The evidence tends to show that he knew of a concealed and terrible danger in the place, of which he did not inform the plaintiff, and that the plaintiff could not, in the exercise of ordinary care, ascertain the existence of that danger. We entertain no doubt of the sufficiency of this evidence to take the case to the jury. Further evidence may perhaps show that the risk was a common and ordinary one in a mine of this character, and so was assumed by the plaintiff, or that the plaintiff should have known from the appearance of the hole that it contained the unexploded blast; but neither of these facts now appears so clearly that the court is justified in taking the case from the jury.

Judgment reversed, and action remanded for a new trial.

KNICKERBOCKER ICE CO. v. FINN.

United States Circuit Court of Appeals, Second Circuit, May 3, 1897.

KICKED BY A HORSE—KNOWLEDGE OF VICIOUSNESS.—Where an employee, while driving his employer's wagon, was kicked by a horse which was alleged to be vicious, and that such viciousness was known to the employer's foreman, the questions as to viciousness of the horse and defendant's knowledge of the same were properly submitted to jury.

PLEADING—RULES AND REGULATIONS.—An employer cannot be permitted to set up as a valid defense the employee's violation of a rule which the employer had knowingly permitted to be practically abandoned.

WILLIAM FINN, the plaintiff in the court below, an employee of the Knickerbocker Ice Company, recovered in the Circuit Court for

the Southern District of New York a verdict for \$7,500, in an action against said company for damages caused by the kick of a horse of the defendant which inflicted so severe an injury as to compel the amputation of the plaintiff's leg.


JOHN M. GARDNER, for plaintiff.

CHARLES C. NADAL, for defendant.

PER CURIAM. The defendant, at the close of the entire testimony, moved for a direction for a verdict in its favor upon the ground that there was no proof of negligence on the part of the defendant; that there was no evidence that the horse was a vicious animal or that it had any propensity to kick of which the plaintiff should have been notified, and that the plaintiff was guilty of contributory negligence. The court denied the motion, to which the defendant excepted.

The plaintiff was a "helper" in the employment of the Ice Company, that is, he helped or assisted the driver of one of the ice wagons in the delivery of ice upon his route. He also drove while the driver was delivering ice. On the occasion of the accident, he was driving and occupied the usual seat, which placed his legs very near to the heels of the horses. The horse which broke Finn's leg was an "extra" horse and was occasionally used. There was no question in the case in regard to the liability of the company, if it had furnished one of its drivers, without warning, a vicious horse which the company knew or ought to have known was vicious, while the driver did not know and was under no obligation to know the animal's evil habit. The points upon which the defendant principally relies are, First, that there was no proof that the horse had a propensity to kick without provocation, and, Second, that there was no proof that the defendant's foreman had knowledge of such a propensity, or that he had any knowledge which he should have communicated to Finn.

The testimony on the part of the plaintiff was to the effect, that on two separate occasions, shortly before the accident, this horse, viciously and without provocation, kicked in a very dangerous manner; that on one occasion, after having repeatedly kicked, he was returned to the stable and the superintendent, upon being informed of the reason for the return, furnished another horse, and that on the other occasion an employee told the superintendent of the horse's bad conduct. The testimony in regard to the horse's vicious propensity and the company's knowledge of it, is confined to these two instances; but, if the testimony for the plaintiff is to be believed, the kicking was very wilful and without adequate cause. The company assigned a cause which is consistent with his good character.



The court charged the jury that there was no substantial evidence that the horse was a generally vicious horse, and that the question was whether he had the propensity, rendering him unsafe, sometimes to kick, without cause or provocation, and whether the superintendent had reasonable cause to believe that the horse was an unsafe horse to be sent out with the plaintiff and his driver. There was sufficient evidence to compel a submission of these questions to the jury.

The defendant's remaining point is that the plaintiff was, in driving the horse, disobeying a rule of the defendant, and was therefore guilty of contributory negligence.

The defendant had a rule, on paper, which Finn knew, and which prohibited any employee, except the drivers themselves, from driving the horses. There was ample evidence that this rule was, and was known by the company to be, a dead letter.

The defendant insisted that the plaintiff ought not to recover, because, at the time he was hurt, he was acting in violation of this rule. The court charged as follows:

"If there was a rule of that character in force and the plaintiff was violating it at the time he received this injury, he is not entitled to recover; but if you come to the conclusion that although there was such a printed regulation it was not enforced, it was a dead letter, that everybody connected with the company knew that the helpers were expected on occasions to drive the defendant's horses, and that the plaintiff was injured while driving upon one of these occasions, then the rule is no defense."

To the correctness of this charge, both in morals and in law, there can be no valid objection. An employer cannot be permitted to set up as a valid defense against the consequences of his own negligence, the employee's violation of a rule which the employer had knowingly permitted to be practically abandoned. *Northern Pacific R. Co. v. Nickels*, 50 Fed. Rep. 718.

The judgment of the Circuit Court is affirmed, with costs.

TEXAS AND PACIFIC RAILWAY COMPANY v. BARRETT.

United States Supreme Court, April, 1897.

EMPLOYEE INJURED IN BOILER EXPLOSION—DEFECTIVE APPLIANCES—BURDEN OF PROOF.—Where an employee is injured in a boiler explosion the burden is upon plaintiff to prove that the explosion was caused by defective appliances used by defendant, and that he did not by his negligence contribute to his own injury.

IN ERROR to the United States Circuit Court of Appeals for the Fifth Circuit. The facts appear in the opinion.

JOHN F. DILLON, W. S. PIERCE and D. D. DUNCAN, for plaintiff.
A. H. GARLAND and R. C. GARLAND, for defendant.

MR. CHIEF JUSTICE FULLER. — This was an action to recover for personal injuries, brought by Barrett, in the District Court of Tarrant County, Texas, against the Texas & Pacific Railway Company, and removed, on the application of the company, to the Circuit Court of the United States for the northern district of Texas. Plaintiff obtained a verdict and judgment, and defendant thereupon carried the case on writ of error to the Circuit Court of Appeals for the Fifth Circuit, by which the judgment was affirmed. (30 U. S. App. 196, 14 C. C. A. 373, and 67 Fed. Rep. 214.)

Plaintiff's complaint averred that he "is a resident of said Tarrant county, and that defendant is a railway corporation, duly incorporated." The petition for removal was sufficient, and, as the company was created by act of Congress, the Circuit Court properly entertained jurisdiction. *Railway Co. v. Cody*, 17 Sup. Ct. 703.

On the trial there was evidence tending to show that Barrett, while in the employment of the company, as foreman in charge of a switch engine, and at work in the company's yard, was injured by the explosion of another engine, with which he had nothing, and was not required to have anything, to do, and which had been placed by the foreman of the roundhouse on the track in the yard, with steam up, to take out a train; that the boiler of the locomotive at the time it exploded, and for a considerable time before that, was and had been in a weak and unsafe state, by reason of the condition of the stay bolts, many of which had been broken before the explosion, and some of them for a long time before; that there were well-known methods of testing the condition of stay bolts in a boiler engine; and that, if any of these tests had been properly applied to

this boiler, within a reasonable time before the explosion, the true condition of the stay bolts would have been discovered.

The Circuit Court instructed the jury, at defendant's request, "that the master is not the insurer of the safety of its engines, but is required to exercise only ordinary care to keep such engines in good repair, and, if he has used such ordinary care, he is not liable for any injury resulting to the servant from a defect therein, not discoverable by such ordinary care;" "that the mere fact that an injury is received by a servant in consequence of an explosion will not entitle him to a recovery, but he must, besides the fact of the explosion, show that it resulted from the failure of the master to exercise ordinary care, either in selecting such engine, or in keeping it in reasonably safe repair;" "that a railway company is not required to adopt extraordinary tests for discovering defects in machinery, which are not approved, practicable and customary, but that it fulfills its duty in this regard if it adopts such tests as are ordinarily in use by prudently conducted roads engaged in like business, and surrounded by like circumstances."

And thereupon further charged that a railway company is bound to use ordinary care to furnish safe machinery and appliances for the use of its employees, and the neglect of its agents in that regard is its neglect; that it is not bound to insure the absolute safety thereof, nor to supply the best and safest and newest of such mechanical appliances, but is bound to use all reasonable care and prudence in providing machinery reasonably safe and suitable for use, and in keeping the same in repair; that "by ordinary care is meant such as a prudent man would use under the same circumstances; it must be measured by the character and risks of such business; and where such persons, whose duty it is to repair the appliances of the business, know, or ought to know by the exercise of reasonable care, of the defects in the machinery, the company is responsible for their neglect;" that "if the jury believe from the evidence, under the foregoing instructions, that the boiler which exploded and injured the plaintiff was defective, and unfit for use, and that defendant's servants, whose duty it was to repair such machinery, knew, or by reasonable care might have known, of such defects in said machinery, then such neglect upon the part of its servants is imputable to the defendant, and if said boiler exploded by reason of said defects, and injured the plaintiff, the defendant would be responsible for the injuries inflicted upon plaintiff, if plaintiff in no way, by his own neglect, contributed to his injuries;" but that "the burden of the proof is on the plaintiff throughout this case to show that the boiler and engine that exploded were improper appliances to be used

on its railroad by defendant; that, by reason of the particular defects pointed out and insisted on by plaintiff, the boiler exploded, and injured plaintiff. The burden is also on plaintiff throughout to show you the extent and character of his sufferings, and the damages he has suffered by reason thereof. You must also be satisfied that plaintiff was ignorant of the defects in the boiler that caused its explosion, if the evidence convinces you that such was the case; and that he did not, by his negligence, contribute to his own injury."

We think that these instructions laid down the applicable rules with sufficient accuracy and in substantial conformity with the views of this court as expressed in *Hough v. Railway Co.*, 100 U. S. 218; *Railroad Co. v. Herbert*, 116 U. S. 647, 6 Sup. Ct. 590; *Railroad Co. v. McDade*, 135 U. S. 554, 10 Sup. Ct. 1044; *Railroad Co. v. Daniels*, 152 U. S. 688, 14 Sup. Ct. 756; *Railroad Co. v. Babcock*, 154 U. S. 190, 14 Sup. Ct. 978, and other cases.

Exceptions were reserved to portions of the charge, and to the refusal of the Circuit Court to give certain instructions requested by defendant; but, taking the charge as a whole, we are of opinion that the Circuit Court of Appeals rightly held that no reversible error was committed. These matters fully appear in the report of the case in that court, and we do not feel called upon to restate them here in detail.

Judgment affirmed.

MARTIN v. ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY.

United States Supreme Court, April, 1897.

LABORER INJURED IN COLLISION—FELLOW-SERVANTS.—An employee injured on a hand car in collision with a train through alleged negligence of the train operatives, and also of the section foreman to note the approaching train, could not recover damages, as such injury resulted from negligence of fellow-servants.

IN ERROR to the Supreme Court of the Territory of New Mexico. The facts appear in the opinion.

NEILL B. FIELD, for plaintiff in error.

E. D. KENNA and ROBERT DUNLAP, for defendant in error.

MR. JUSTICE PECKHAM.—This action was brought by the plaintiff in error to recover damages for injuries sustained by him by

being run over by a train on a railroad belonging to the defendant, near Albuquerque, N. M. The case was tried before a jury in the District Court of the Second Judicial District of that territory, and resulted in a verdict for the plaintiff, in the sum of \$8,000. Judgment having been entered, the railroad company took the case, by writ of error, to the Supreme Court of the territory, which court reversed the judgment, and directed judgment for the railroad company; and for costs against the plaintiff, who thereupon sued out a writ of error from this court, and the case is now here for review.

On the trial evidence was given showing substantially the following facts: The plaintiff had been employed by the railroad company at Albuquerque, N. M., as a common laborer, "fixing the road, straightening out the rails, and fixing ties wherever required." He was about thirty-nine years of age, and had been so employed by the company, through one of its section foremen, for several months prior to the happening of the accident. He was under the orders of the section foreman, and was to do what the foreman told him. The section foreman was employed by the roadmaster, and the foreman employed the men. The roadmaster directed the section foremen what work to do and where to do it. He laid out the work for them, and told them what to do. The section foreman employed the men, and saw that they did the work properly. If the foreman thought a man ought to be discharged, he would see the roadmaster, or send him a request that the man should be discharged, and the roadmaster had the power to discharge him. The men under the section foreman, like the plaintiff, were paid by the agents of the company, who came along the line in a pay car. On June 5, 1889, while the plaintiff was thus employed, he came to the station at Albuquerque about 6:45 o'clock in the morning for the purpose of going to his work on a hand car with one Mares, his co-laborer, and Charles Smith, his section foreman. The place where they were to work was about eight or nine miles north from Albuquerque, on the line of the road. A few minutes before seven, the party, consisting of the section foreman, Mares, and the plaintiff, started on a hand car for the place where they were to work during the day. They went north upon the road for 300 or 400 yards, and there the car was stopped, and the men got off and procured a barrel of water, which was placed on the car, and the men again started north to continue their ride. All three men worked the crank on the hand car, but just as they started Mares said to the foreman that he thought the work train seemed to be starting from Albuquerque towards them. The track at that point was straight, and the view to the station was unobstructed. Plaintiff then turned his head backward towards the station, when the foreman

told him not to do that; that he had no business to do it; that it was not his business to watch for trains; and that he, the foreman, would take care of that. Plaintiff thereupon turned his head away from the station, and continued to look north, the way they were going. They worked the crank so that the car was going as rapidly as they could make it, all three men having their heads turned towards the north. In the meantime a work train backed out from the station at Albuquerque, going north, and continued backing rapidly until it was moving at the rate of seventeen or eighteen miles an hour. Before the men on the hand car had proceeded very far along the road they were overtaken by the work train, which ran over them, killing the foreman and badly injuring the plaintiff and Mares. Neither of the latter had heard the approach of the train. It was under the management of a conductor, and at that time there was a roadmaster on the train who had control of the line of road where the accident occurred. He was not in charge of the running of the train, but the train went to different points on the road as he had occasion to visit them for working purposes. Some of the hands on the work train saw the hand car a short distance before it was struck, and one of them tried to communicate with the engineer of the train, but failed. No one on the hand car was looking backward, or saw the approach of the work train. It was claimed in the petition on the part of the plaintiff, that the accident occurred from the neglect of the conductor and of the hands on the work train, and also by reason of the neglect of the section foreman on the hand car with the plaintiff in ordering plaintiff to face north while working the car, and in not keeping a lookout himself for the approach of the train from behind. The defendant had filed a plea not guilty.

Upon the trial of the action, after the evidence for both sides had been introduced, and each side had rested the case, the defendant moved the court "to instruct the jury to find for the defendant, upon the ground that the negligence, if any, through which the plaintiff was injured, was the negligence of the fellow-servants of the plaintiff, for which the defendant is not liable." After hearing arguments, the court overruled the defendant's motion, and counsel for the defendant then and there excepted. After the verdict for plaintiff had been rendered, and judgment entered thereon, the defendant obtained a writ of error from the Supreme Court of the territory to review the rulings of the district court. Various assignments of error were made, and among them was the eighth, which reads as follows: "The court erred in not sustaining defendant's

motion to instruct the jury to find a verdict in favor of the defendant, and the defendant not guilty."

The Supreme Court held that whatever negligence was proved, as against the employees of the defendant, such negligence was that of fellow-servants with the plaintiff, and on that ground the judgment was reversed, and judgment ordered in favor of the defendant, with costs. The plaintiff seeks here a reversal of the last judgment.

We think the decision of the Supreme Court was right, and that the judgment entered thereon must be affirmed.

The cases of *Railroad Co. v. Baugh*, 149 U. S. 368; *Railroad Co. v. Hambly*, 154 U. S. 349; *Railroad Co. v. Peterson*, 162 U. S. 346; and *Railroad Co. v. Charless*, 162 U. S. 359, cover this case in all its aspects, and render it entirely clear that the employees of the defendant herein, whose negligence caused the injury to the plaintiff, were his fellow-servants at that time, and hence the defendant cannot be held liable to plaintiff for the injuries sustained by him as a result of that negligence.

The counsel for the plaintiff has argued before us that the defendant must be held responsible because the plaintiff had been directed by the foreman, under whose orders he was placed, to look north while he was on the car, and had received the foreman's assurance that he (the foreman) would warn him of the approach of danger, and that, as the foreman failed to do so, it was the failure of the defendant to do something which it was bound as a master to do in furtherance of the obligation it was under to see that the plaintiff had a reasonably safe place in which to perform his work. We do not perceive that the doctrine as to the duty of the master to furnish a safe place for the servant to work in, has the slightest application to the facts of this case. There is no intimation in the evidence, nor is any claim made, that the hand car upon which the plaintiff was riding was not properly equipped and in good repair, and in every way fit for the purpose for which it was used. It was a perfectly safe and proper means of transit, in and of itself, from the station at Albuquerque to the point where the plaintiff was going to work. The negligence of the section foreman in failing to note the approaching train, and to give the proper warning, so that the car might be taken from the track, was not the neglect of the defendant in regard to the performance of any duty which, as master, it owed the plaintiff. If the car were rendered unsafe, it was not by reason of any lack of diligence on the part of the defendant in providing a proper car, but the danger arose simply because a fellow-servant of the plaintiff failed to discharge his own duty in watching for the approach of a train from the south.

Upon an examination of the cases above cited, it will be found that the principles therein laid down clearly and plainly cover this case.

The judgment must be affirmed.

MR. JUSTICE HARLAN dissented.

NORTHERN PACIFIC RAILROAD COMPANY ET AL. V. POIRIER.

United States Supreme Court, May, 1897.

BRAKEMAN INJURED IN COLLISION—TRAIN RULES—INSTRUCTION.—In an action to recover damages for injuries sustained in a collision by a brakeman on one train due to alleged negligence of servants of another train, it was error to charge that the jury might infer from the mere fact that one of the trains was a "wild" train, not running on schedule time, that the train rules were dispensed with, there being no evidence to show that authority was given to dispense with the rules, and verdict for plaintiff was reversed (1).

IN ERROR to the United States Circuit Court of Appeals for the Ninth Circuit.

This was an action originally brought in a court of the State of Washington, and which was removed into the Circuit Court of the United States for the district of Washington.

The plaintiff, in his complaint, alleged that on December 7, 1892, while in the employ of the Northern Pacific Railroad Company, as a brakeman, he received personal injuries of a severe character, occasioned by the negligence of the defendant company. The plaintiff recovered a verdict in the sum of \$21,600, which was reduced upon the election of the plaintiff to avoid a new trial, to the sum of \$7,500, for which judgment was entered. The case was taken to the Circuit Court of Appeals of the Ninth Circuit, where the judgment of the trial court was affirmed. The case was then brought to this court on a writ of error to the judgment of the Circuit Court of Appeals. The principal facts of the case are thus stated in the opinion of the Circuit Court of Appeals:

"The collision occurred about midnight. The first train was a regular local freight train, running on schedule time, under the management, control and direction of the conductor. The second train was running under telegraphic orders, without any schedule or time card, known in railroad parlance as a 'wild train.' At Mos-

1. Reversing 67 Fed. Rep. 881, 15 C. C. A. 52.

cow, a station on the railroad, the second train was standing upon the track when the first train left that station. At Vollmer, another station, the first train stopped to drop some cars. It was detained about ten minutes, when it resumed its course over the mountain grade. The second train was then in sight, standing on the track, a short distance in the rear, with its lights plainly visible. Clyde Spur, where the collision occurred, is about six miles from Vollmer. It is a place on the road where there is a spur track running out to a logging camp, where saw logs and cordwood are loaded on the cars. There is a side track or switch, upon which cars are left to be run out on the spur track. It is not a regular station, and the regular freight train only stops there when there are empty cars to be left or loaded ones to be taken away. The first train, on the night in question, had certain cars to be left at this place, and stopped there for that purpose. There were three brakemen on the train. The head brakeman, when the train was slowing up, left his place, and started forward to open the switch. The rear brakeman, at this time, saw the second train rounding a curve in the road, and immediately signaled it to stop, and at the same time shouted as loud as he could. The second train was then about one-quarter of a mile behind the first train. The first train had barely come to a full stop when the second train, moving at a speed of about four miles an hour, struck it by running the cowcatcher of its engine under the rear end of the caboose on the first train. The conductor of the first train had been lying down, but was in his seat in the lookout of the caboose, and passed out of the rear end just before the collision occurred. The conductor of the second train had not been notified that the first train would stop at Clyde Spur."

By the shock caused by the collision of the two trains the plaintiff, who was acting as middle brakeman, was thrown from the car on which he was standing, and received severe injuries.

In the plaintiff's complaint it was alleged "that the said defendant, the Northern Pacific Railroad Company, was guilty of carelessness and negligence in this: That the conductor of said first train well knew that said second train was following said first train, and failed to leave a flagman in the rear of said first train before and at the time said first train stopped at said Clyde Spur, to hold and stop said second train, as he was in duty bound to do; that the place where said collision occurred was on a mountain grade, and the said defendant, the Northern Pacific Railroad Company, was guilty of carelessness and negligence in allowing said second train to follow the first train closely, and was guilty of carelessness and negligence in running the second train into said first

train, whereby the plaintiff was injured as aforesaid." The defendant, answering, denied negligence on its part, and alleged that plaintiff's injuries were owing to and caused by his contributory negligence and by the carelessness and negligence of his fellow-servants. It is admitted in the brief of the plaintiff in error that the defense of contributory negligence on the part of the plaintiff was not made out, and the controversy resolves itself into the question whether the plaintiff's injuries were caused by the negligence of his fellow-servants within the rule on that subject.

Before the trial and on the application of the attorneys for the plaintiff, it was ordered that Thomas F. Oakes, Henry C. Paine and Henry C. Rouse, the receivers of the defendant company, be, and they were thereby, made parties defendant in the action.

C. W. BUNN, for plaintiffs in error.

S. C. HYDE, for defendant in error.

At the close of the evidence the defendant moved the court to give the following instruction:

"In this case there is no evidence that the defendant, the Northern Pacific Railroad Company, was guilty of any negligence which caused the accident by which plaintiff was injured, or which contributed thereto, and that, if there was any negligence, it was that of the engineer and conductor, or of one of them, of the second train; and, such conductor and engineer being fellow-servants of the plaintiff, there would be no liability therefor on the part of the railroad company, and, therefore, you will return a verdict for the defendants."

The refusal of the trial court to give this instruction was assigned for error in the Circuit Court of Appeals, and the ruling of the latter court in affirming such refusal is complained of in the first assignment in this court.

This request assumes that there was no evidence of negligence on the part of the conductor of the first train sufficient to submit to the jury. The trial court said as to this question: "The particular negligence charged against the railroad company is that the conductor of the first train—the one upon which the plaintiff was employed as a brakeman—when he brought his train to a stop at Clyde Station, neglected his duty by failing to place a flagman a sufficient distance back on the track to warn the following train, which is called the 'second train' in his complaint, of the danger of coming too close to that station while the first train was stopped there." The Circuit Court of Appeals made no observation on this part of the case. Both the courts discuss the case chiefly upon the question

of the liability of the company arising out of the negligence shown in the management of the second train.

The counsel for the defendant in error contends, in his brief, that the conductor of the first train was guilty of negligence in not obeying the rules of the company, put in evidence by the plaintiff (1).

It is difficult to perceive that these rules had any applicability to a case like the present. They seem plainly intended to meet the exigency of a train stopped by an accident or obstruction, or unexpectedly compelled to stop between stations. It can scarcely be supposed that their directions are to be followed every time a train stops at a station.

Moreover, in the present case, it appears from the testimony of the plaintiff's witnesses that no time was afforded for the use of such precautions. The second train was following so closely that the collision took place almost at the instant the first train had come to a stop, and before the rear brakeman could do more than to signal with his lantern, and to call out. The conductor of the first train is not shown to have had any reason to suppose that the second train would run into him when stopping at a station, in utter disregard of the company's rules.

1. The following are the rules put in evidence :

"Rule 133. When a train is stopped by an accident or obstruction, the rear brakeman must immediately go back with danger signals to stop any train moving in the same direction. At a point fifteen telegraph poles from the rear of his train he must place one torpedo on the rail. He must then continue to go back at least thirty telegraph poles from the rear of his train, and place two torpedoes on the rail, ten yards apart, when he may return to the point where first torpedo was placed, and he must remain there until recalled by the whistle of his engine ; but if a passenger train is due within ten minutes he must remain until it arrives. When he comes in he will remove the torpedo nearest the train, but the two torpedoes must be left on the rail as a caution signal to any following train. If it becomes necessary to protect the front of the train, the front brakeman must go forward, and use the same precautions. In case of

necessity the fireman will be required to act as flagman.

"Rule 134. When a flagman is sent out to signal any approaching train, he must, if possible, avoid stopping on a curve, or behind any obstruction, endeavoring to pass beyond the same, should such exist, and reach a position where he can be clearly seen from the approaching train, for at least one-fourth of a mile. The conductor must know that his train is fully protected in both directions, and he will be held responsible if any accident occurs from want of any precaution which could have been taken."

"Rule 156. When any section of a train is unable to make the specified time, the conductor will drop a man, with danger signals, to warn the following train. It is the duty of the conductor of every train, when the train stops for any cause, to immediately protect the rear end of his train as per Rule 133. No understanding with the conductor of the following train will relieve from this duty."

We are inclined to think that, if the plaintiff's case depended wholly on his being able to convict the conductor of the first train of negligence, there was not sufficient evidence adduced at this trial to have justified the trial judge in submitting the case to the jury on that issue.

It is, however, further contended on behalf of the defendant in error — and upon this the stress of the case is mainly put — that under the facts disclosed in the record, the trial court was justified in submitting to the jury, and the jury in finding that the defendant company was liable for the results of the negligence in the management of the second train.

There is no effort to call into question the numerous decisions of this court whereby it has been firmly established that one who enters the service of another takes upon himself the ordinary risks of the negligent acts of his fellow-servants in the course of the employment. Indeed, it is conceded in both the opinion of the Circuit Court of Appeals and in the brief of the defendant in error, that the conductor of the second train was a fellow-servant with the plaintiff, and that, if the collision was caused solely by his negligence, the defendant would not be liable.

The argument to maintain the liability of the defendant company, notwithstanding this concession, is based upon the evidence that tended to show that the second train was a "wild train," running on telegraphic orders, without any schedule or time table, and that the conductor of that train was not notified that the first train would stop at Clyde Spur.

One of the plaintiff's witnessess (Allen, the rear brakeman on the first train) testified that the second train was "running by telegraphic orders, and had no schedule orders or time card." This was doubtless true, as it is true of every "wild" or extra train; but such a fact by no means warrants the inference drawn by the trial court and given in the charge to the jury that "the train was running under special orders as to the time it was to make, where it was to go, and when it should reach the different stations." It cannot be justly inferred from the mere fact that the second train was a "wild train," that its conductor was relieved from obeying the laws of the company. Among those rules, put in evidence by the defendant company, is:

"Rule 120. A train must not leave a station to follow a passenger train until five minutes after the departure of such passenger train, unless some form of block signal is used. In mountain districts they will not follow first-class trains descending, under any circumstances, until such trains are duly reported at next telegraph station.

Freight trains must not follow each other descending mountain grades. They may ascend in sections when handled with mountain power in the rear. Descending passenger trains may follow freight trains as per rule 121. Ascending passenger trains will not leave station at foot of mountain until track is known to be clear.

"Rule 122. Freight trains following each other must keep not less than ten minutes apart (except in closing up at stations or at meeting or passing points), unless some form of block signal is used."

Assuredly, more evidence must be given than the mere fact that the second train was a "wild" train, not running on schedule time, to justify an inference, by either court or jury, that the conductor was relieved by such fact from regarding the rules of the company regulating the running of its train. Nor does the statement of the conductor of the second train that he had not been notified that the first train was to stop at Clyde Spur show that he had any right to dispense with the rules. While he did say that he had not been notified that the first train would stop at Clyde Spur, he does not say that he did not know of such intention. At all events, it was clearly shown by the plaintiff's witnesses that the trains were in immediate proximity to each other at Vollmer, the last station before reaching Clyde Spur; that the second train followed the first so closely that the collision occurred almost immediately after the leading train had come to a stand; and that the rear brakeman, who saw the second train approaching before his own train had fully stopped, did not have time to warn his fellow-brakeman, nor himself get to the ground, before the collision took place.

These facts disclose a palpable disregard by the conductor and engineer in charge of the second train of ordinary prudence and of the rules which it was their duty to observe. We see no ground for the assertion that their conduct was directed or controlled, in these particulars, by orders from some agent or dispatcher of the defendant company, "clothed with the duty of sending out the second train, and having the control, management and direction of its movements." Such conjectures did not constitute evidence to be submitted to the jury.

Accordingly we think that the defendant was entitled to have had the following instruction given to the jury: "If the jury find from the evidence in this case that the accident which caused the plaintiff's injury was caused by the negligence of the conductor or engineer of the extra train in following the first train too closely, or by running down the grade at too high a rate of speed, or in not keeping the extra train in proper control, or by any other act or neglect of the conductor or engineer of the first train, then I instruct

you that the defendants are not liable, and that you shall return a verdict for the defendant." But this prayer was refused.

So, too, we think the following instruction asked for should have been given: "In determining the question of whether the defendant, the Northern Pacific Railroad Company, was guilty of negligence in the management of their trains, or either of them, the jury are instructed that they may consider the rules of the company, which have been read in evidence; and that, if it appears therefrom that the running and conduct of this second train was provided for, and that the accident was caused by the engineer or conductor of the second train in disregarding such rules, then your verdict must be for the defendants." This instruction was modified by the court adding the following words: "Unless it appeared that the conductor of the train, or some one under whose orders he was acting, had authority in the special case to deviate from the rules." This modification was not warranted by any evidence disclosed in this record. The only orders shown, controlling the conductor and engineer in the management of the second train, were those contained in the rules of the company. As we have already said, to instruct the jury that they might infer, from the mere fact that the second train was a "wild" train, not running by schedule time, that some one in authority had dispensed with the rules in this special case, was to submit mere matter of conjecture as evidence on which they might base a verdict.

The same error vitiates portions of the general charge, which were duly excepted to and assigned for error; but we do not deem it necessary to discuss those assignments in detail. They are disposed of by the observations already made.

Upon the whole, we are of opinion that, giving to the plaintiff's evidence its utmost effect, it did not make a case which should have been submitted to the jury.

The judgment of the Circuit Court of Appeals is reversed. The judgment of the Circuit Court is likewise reversed, and the cause is remanded to that court with directions to set aside the verdict, and award a new trial.

Opinion by MR. JUSTICE SHIRAS.

**WASHINGTON AND GEORGETOWN RAILROAD
COMPANY ET AL. V. HICKEY ET AL.**

United States Supreme Court, April, 1897.

HORSE CAR CROSSING RAILROAD TRACK—NEGLIGENCE OF GATE-MAN—LIABILITY OF HORSE CAR COMPANY FOR INJURIES TO PASSENGER.—Where a passenger on a horse car was injured by being pushed off the car in the commotion resulting from the car crossing, and being enclosed within the gates of a railroad track while a train was approaching, through alleged negligence of gateman in lowering the gates, the fact that the negligent act of a third party contributed to the accident would not absolve the horse car company from the negligent act of its driver in attempting to cross the track while a train was approaching.

IN ERROR to the Court of Appeals of the District of Columbia.

SAMUEL MADDOX and WALTER D. DAVIDGE, for plaintiffs in error.

M. J. COLBERT and GEO. E. HAMILTON, for defendants in error.

This action was brought by the defendants in error, who are husband and wife, to recover from the defendants (the one being a horse car company and the other a steam railroad company) damages for personal injuries sustained by the wife on account of the alleged negligence of the servants of the defendants. The facts of the negligence were alleged in the declaration, and each defendant filed a plea of not guilty, upon which issue was joined. A trial was had in the Supreme Court of the District of Columbia, resulting in a verdict for the plaintiffs, the judgment upon which having been affirmed by the Court of Appeals, the defendants have brought the case here for review.

On the trial, evidence was given tending to show these facts: Mrs. Hickey, one of the plaintiffs, who was living with her husband in the city of Washington, left her home therein on the morning of August 12, 1889, and took a street car of the defendant horse railroad company at the corner of Pennsylvania avenue and Seventh street, for the purpose of going south along the last named street. The car was a summer car, and crowded with people going to the river on an excursion. She sat on the outside of the third seat, in the front of the car, and in a very small space. The people seemed in a hurry, and some of them called out frequently to the driver to "hurry up." Upon coming to the crossing of Seventh street and Maryland avenue, where the car tracks of the two corporations

intersect each other, the steam cars were seen approaching the intersection at quite a rapid rate. The street car stopped upon coming to the crossing, as the railroad gates were lowered. Then, and before the steam train came on, they were raised, and the street car was started; and, after it got on the track of the steam cars, the gates were again lowered, shutting in the street car, the gates coming down, one on the car, and one just behind the horses. When the street car entered upon the steam car crossing, the train on the tracks of the latter company was still moving quite rapidly towards the crossing, and but a short distance away, and in plain sight of the horse car. After getting partially upon the steam railroad track, the gates, as stated, came down, and then they were again raised, and the driver of the horse car whipped up his horses, and the car got across. Before the horse car had crossed the tracks, the steam cars were coming pretty fast. The men who were sitting down in the horse car all got up, and the women commenced screaming. The people on the horse car rushed to get off, and Mrs. Hickey was, in the course of the excitement and commotion, pushed off the car, and was badly and permanently injured. When she fell, the steam cars were coming down, and the horse car (the gates having been raised) was then driven across to the other side. The train was so close to the horse car that it just got off the track in time to escape being run over, while Mrs. Hickey says she was so near the steam car tracks when the train passed, that she felt the air from the engine upon her head.

One of the witnesses said that the driver of the street car first noticed the train when he was about fifty feet from the steam car track. His car was moving at the rate of four and one-half to five miles an hour, and the train was then between Eighth and Ninth streets, about 300 feet from Seventh street. The driver wanted to cross the steam car tracks before the gate went down, and thought he could do so without danger. He did not see that the gates were being lowered as he approached, and did not put on the brakes or make other effort to stop the car until "he got the bell." The gates were once lowered, and then raised to let the car pass, and then they were again lowered; and it was when they were lowered the second time that they came down between the car and the horses, penning the car in on the steam track. The gates were raised again, and the driver succeeded in getting the horse car across the track before the train approached.

The counsel for the horse car company claimed that the cause of the accident was the commotion immediately preceding it, and by reason of which the plaintiff was pushed from the car and injured;

and the question was, what caused the commotion? He urged that the commotion was caused by the improper and negligent lowering of the gates at the time when they penned the horse car between them, and prevented its progress across the tracks of the steam car company, and that, if the gates had not been thus lowered, the horse car would have had plenty of time to cross, and there would have been no commotion and no accident. He, therefore, made several requests to the court to charge the jury upon that subject. The point of such requests was that if the jury should find that the commotion and confusion which led to the accident were caused by the sudden and negligent lowering of the gates upon the street car, which the driver of that car had no reason to believe would be thus lowered, and if the driver could have crossed in safety but for such lowering, then the horse car company was not responsible, and no recovery could be had against it.

A further request was made to charge that there was no evidence that the management of the horse car entered into or contributed to the negligence of the gatekeeper, and, if the jury should find that the injury was caused by the negligence of the gatekeeper, the verdict must be in favor of the horse car company; also, that if the jury should find that the horse car would have passed the steam car track without injury to the plaintiff except for the lowering of the gates upon the horse car, and that the lowering was the cause of the injury, and was an act of negligence on the part of the gatekeeper, then the horse car company was not responsible for the injury; also, that if the jury found the injury to have been the result of negligence of the gatekeeper in the management of the gates, and that but for such negligence the injury would not have been sustained by the plaintiff, and that the driver of the horse car did not know and had no reason to believe that the gatekeeper would be negligent, then the plaintiffs were not entitled to recover against the horse car company.

The refusal of the court to charge as requested was excepted to, and is now made a ground for the reversal of the judgment by this court.

The alleged negligence of the horse car driver consisted in endeavoring to cross at all, under the circumstances, until after the passage of the train on the steam railroad. Upon the evidence, the jury would have been justified in finding that he had no right to indulge in any close calculation as to time in attempting to cross the steam car tracks before the train thereon reached the point of intersection; that it was a negligent act in making the attempt under a state of facts where the least interruption or delay in the crossing over by

the horse car would probably lead to an accident. In this view of the evidence and finding, it was not material that the driver had no ground to expect the particular negligent act of lowering the gates, and the consequent obstruction to his passage across the steam car tracks, or that he would have had time to cross if the delay thus occasioned had not occurred. The jury had the right to find it was negligent to cause his car to be so placed that any delay might bring on a collision. The apparent liability to accident, if any delay should occur from any cause whatever, was plain; and such fact would support a finding of negligence in attempting to cross before the steam car train had passed. In such case it would be no excuse that the particular cause of a possible or probable delay, viz.: the lowering of the gates, was not anticipated. The important fact was that there existed a possibility of delay, and, therefore, of very great danger, and that danger ought to have been anticipated and avoided. A delay might be occasioned at that time by an almost infinite number of causes. The horses might stumble. The harness might give way. The car might jump the track. A hundred different things might happen which would lead to a delay, and hence to the probability of an accident. It was not necessary that the driver should foresee the very thing itself which did cause the delay. The material thing for him to foresee was the possibility of a delay from any cause, and this he ought naturally to think of; and a failure to do so, and an attempt to cross the tracks might be found by the jury to be negligence, even though he would have succeeded in getting across safely on the particular occasion if it had not been for the action of the gatekeeper in wrongfully lowering the gates. The act of the driver being a negligent act, and that act being in full force, and in the very process of execution at the time the accident occurred, which accident would not have happened but for such negligent act, the fact that another negligent act of a third party contributed to the happening of the accident would not absolve the horse car company. The negligent act of the horse car driver joined with and became a part of the other act in wrongfully lowering the gates, as described; and both acts constituted but one cause for the commotion which naturally resulted therefrom, and on account of both of these acts, as parts of the whole transaction, the injury occurred (1). We think there was no error in the refusal of the court to charge as requested, and the exceptions to such refusal are therefore untenable.

1. The Court cited on the question *road Co.*, 105 U. S. 249; *Carter v. Insurance Co. v. Towne*, 103 Mass. 507; *Davidson v. Tweed*, 7 Wall. 44; *Scheffer v. Rail- Nichols*, 11 Allen, 114.

Another objection now urged by the counsel for the defendant railroads is to the charge of the learned judge on the subject of damages. In response to the request of counsel for plaintiffs, the judge charged that:

"If the jury find from all the evidence that the plaintiffs are entitled to recover in this action, then they shall award such damages within the limits of the sum claimed in the declaration as will fairly and reasonably compensate the plaintiff Margaret for the pain and suffering caused to her by the injury which she sustained, and for the injury to her bodily health and power of locomotion, if any such they find, which she has sustained in the past, and will continue to sustain in the future, as a natural consequence of said injury, and for such internal injuries and impairment to her physical health as they may find to be established by the evidence."

And the judge also charged:

"Your verdict, if you find for the plaintiff, must be a matter to be fixed by you in the exercise of a sound discretion, subject, of course, to the limits placed in the declaration, of \$30,000."

The objection which the counsel makes to this charge is that it amounted to a direct intimation to the jury that the finding of a verdict for the sum named in the declaration would not be excessive, and that the jury were misled by it, for they brought in a verdict for the plaintiff for \$12,000, which the court actually found to be excessive, and directed that the verdict should be set aside unless plaintiffs consented to remit \$6,000, which they did.

But we fail to find from the record that any exception was taken to the charge of the judge upon this subject of damages. We do not intimate that an exception would have been good if it had been taken. It is sufficient that no exception raises the question, and we do not, therefore, either discuss or decide it.

We have carefully examined the various points raised by the learned counsel for the steam railroad company, and are of opinion that they show the existence of no material errors in the conduct of the trial which could or in any way did prejudice the company. There was proper and sufficient evidence submitted to the jury on the question of the employment of the gateman by the steam railroad company. Although there was no direct evidence of an actual contract of employment entered into between the company and the gateman, yet there was ample evidence from which an inference of such employment might properly have been drawn by the jury. We also think the duties of a person so employed were correctly stated to the jury. The question whether the

gatemanager neglected to properly discharge those duties was submitted to the jury in a manner to which no exception could be taken.

Upon an examination of the whole case, we find no error prejudicial to either company, and the judgment against both must be affirmed.

Opinion by MR. JUSTICE PECKHAM.

TEXAS AND PACIFIC RAILWAY COMPANY v. CODY.

United States Supreme Court, April, 1897.

CROSSING RAILROAD TRACK — NEGLIGENCE — INSTRUCTION. —

Where plaintiff was injured while attempting to cross defendant's railroad track on a dark night, an instruction that if plaintiff's failure to use due care was the proximate cause of the injury, he could not recover, notwithstanding defendant may have been negligent in failing to ring bell or in some other matter, correctly stated the law and covered all that the defendant company had the right to demand.

IN ERROR to the United States Circuit Court of Appeals for the Fifth Circuit.

This was an action commenced by Henry D. Cody against the Texas and Pacific Railway company in the District Court of Tarrant County, Texas, and removed by defendant to the Circuit Court of the United States for the Northern District of Texas.

Plaintiff alleged in his petition that on March 4, 1892, he was injured at the crossing of the track of the defendant company, over Jennings avenue, in the city of Fort Worth, Texas, by the carelessness and negligence of the defendant and its agents and servants. Defendant demurred generally, and pleaded the general issue, and, in special pleas, alleged the contributory negligence of plaintiff, and his failure to exercise due care under the circumstances. The issues were submitted to a jury, which found a verdict in favor of plaintiff for the sum of \$7,500, on which judgment was rendered. The case was taken to the Circuit Court of Appeals for the Fifth Circuit, and the judgment affirmed (30 U. S. App. 183, 14 C. C. A. 310, and 67 Fed. Rep. 71), whereupon it was brought to this court by writ of error.

JOHN F. DILLON, W. S. PIERCE and D. D. DUNCAN, for plaintiff in error.

E. B. KRUTTSCHNITT, E. H. FARRAR, B. F. JONAS and THOMAS F. WEST, for defendant in error.

The railway company raised a preliminary question of jurisdiction, but on review it was held that the Circuit Court properly entertained jurisdiction.

As to the case on the merits. Fourteen errors were assigned in that court to the judgment of the Circuit Court, which were reduced to six in this court, of which the first was merely that the Court of Appeals erred in affirming the judgment. The five specific grounds of error assigned are that the Circuit Court erred in refusing to give each of the following instructions asked for by defendant:

"1. The defendant asks the court to instruct the jury to return a verdict in this case for the defendant."

"3. You are instructed that it was the duty of plaintiff, upon approaching the railroad track on Jennings avenue crossing, if he was hurt on said crossing, to stop and look and listen for the approach of the train on the track before attempting to pass over said crossing; and if you believe from the evidence that he failed to stop and look and listen, and that, in consequence of such failure, he was injured, you will find for defendant, even though you should believe from the evidence that the defendant was negligent either in respect to not furnishing a light at said crossing, or in respect to not giving signals of the approach of the train, or was negligent in respect to both of such matters."

"7. You are instructed that the rights of the railway company and of the public are not equal, but that the right of the company is superior to the right of the traveling public on all parts of its track, even at crossings."

And that there was error in that portion of the charge relating to the right of a person crossing a railroad track to expect the railroad company to give the signals required by law, and in that relating to the damages.

There was evidence tending to show that on March 4, 1892, on a very dark night, plaintiff was walking along Jennings avenue, in Fort Worth, and towards the track of defendant, which he approached from the south, and which crossed Jefferson avenue at right angles; that, as he approached, he slackened his pace, walked slowly, listened, looked and saw and heard no train; that there was no light on the crossing, no bell ringing, no blowing of a whistle, and no light indicating the approach of a train; and that, as he passed over the track, he was struck by a train backing over the crossing, knocked down, and severely injured. The evidence was conflicting on the questions of negligence and contributory negligence, and the Circuit Court

did not err in refusing to peremptorily instruct the jury in defendant's favor.

So far as the refusal of defendant's instructions numbered 3 and 7 is concerned, the charge must be considered as a whole, as, however correct either of them might be, the court was not obliged to use the language of counsel, and, if the jury were otherwise properly advised on these points, that was sufficient.

And this observation is applicable also to the exception to the reference to the giving of signals. That cannot be passed on as an isolated proposition.

After giving certain instructions requested by defendant, the court instructed the jury as follows:

"In this case the jury are instructed that plaintiff sues the defendant for the sum of \$10,000, which he says he is entitled to by reason of injuries inflicted on him by defendant company in crushing his leg, and causing its amputation, by serious injuries to his head, and by the bodily and mental pain incident and resulting from said injuries, as also from his diminished capacity to earn a living. He also alleges that he has incurred liabilities for nursing, lodging attention and physician, in the sum of \$700.

"2. If you believe from the evidence that plaintiff was injured on defendant's track east of Jennings avenue, then you will find for the defendant.

"3. If, however, the jury find from the evidence that the plaintiff was injured by the defendant on its track on the crossing of Jennings avenue in Fort Worth, then you are instructed that the statutes of the State of Texas provide 'that each locomotive engine shall have on it a bell or a steam whistle, and that the bell shall be rung or the whistle blown at the distance of at least eighty rods from the place where the railroad shall cross any road or street, and to be kept ringing or blowing until it shall have crossed such road or street or stopped.'

"4. The plaintiff, if he was injured on Jennings avenue while attempting to cross defendant's track, was required to use due care himself to avoid danger. The care which a person who crosses a railroad track on a street in a city is required to use is a question of fact for the jury. It varies with the surrounding circumstances. Such person is required to use due care to avoid danger. Should he not do so, and his own negligence is the proximate cause of his injuries, he cannot recover, although the railroad company may not have given the signals which the law requires to indicate the approach of the train.

"5. Should you believe from the evidence that the plaintiff knew,

or by the use of reasonable diligence might have known, of the approach of defendant's train, and thereby have avoided the danger, then you will find for the defendant.

" 6. If, on the other hand, you believe from the evidence that the plaintiff's negligence was not the proximate cause of his injuries, and that plaintiff, without fault on his part, was injured by defendant at Jennings avenue crossing through want of proper care on the part of the defendant, then you will find for plaintiff in any sum not to exceed \$10,000.

" A person attempting to cross a railroad track has the right to expect that the railroad will give the signals required by law, and if he is without fault and such neglect on the part of the road results in his injury, then he can recover.

" 7. The degree of care that was proper care on the part of the plaintiff and defendant must fit and grow out of the time, the occasion and circumstances. If the night was dark and misty, and no arc light or other light lit up the crossing at Jennings avenue, then to the extent that such facts, if at all, increased the danger at the crossing of Jennings avenue, then to that extent was greater care and prudence required of both plaintiff and defendant at said crossing.

" 8. The care to be exercised is such as an ordinary prudent man would exercise under similar circumstances. This is the true rule, whether applied to the alleged negligence of the railroad company or the alleged contributory negligence of the plaintiff; and what is due care under a given state of facts must be determined by the jury by applying the rule as to what, in their judgment, a man of ordinary prudence would have done under the circumstances shown by the evidence.

" 9. If plaintiff was injured at the crossing of Jennings avenue over defendant's track, and his failure to use the care that a person of ordinary prudence would have used under the circumstances was the proximate cause of his injuries, then he cannot recover, although defendant may have also been guilty of negligence in the matter of failing to ring the bell on the engine, or in some other matter."

We think that this gave the law to the jury with substantial correctness, and fully covered all that the company had the right to demand.

The Circuit Court applied the settled rule as expounded by Mr. Justice Bradley in *Improvement Co. v. Stead*, 95 U. S. 161 (1). Tested

1. *Improvement Co. v. Stead*, 95 U. S. 161, was the case of a collision of a special railroad train with a wagon. There was evidence tending to show that the plaintiff, who was driving the wagon, looked to the southward, from

by the principles of that case, the Circuit Court did not err in the matters complained of.

which direction the next regular train was to come, and did not look northwardly, from which this train came; that his wagon produced much noise as it moved over the frozen ground; that his hearing was somewhat impaired; and that he did not stop before attempting to cross the track. The evidence was conflicting as to whether the customary and proper signals were given by those in charge of the locomotive, and as to the rate of speed at which the train was running at the time. The counsel for the railroad company requested the court to give certain specific instructions, to the general effect that the plaintiff should have looked out for the train, and was chargeable with negligence in not having done so; and that it is the duty of those crossing a railroad to listen and look both ways along the railroad before going on it, and to ascertain whether a train is approaching or not. The trial judge refused to adopt the instructions framed by counsel, and charged that both parties were bound to exercise such care as under ordinary circumstances would avoid danger; such care as men of common prudence and intelligence would ordinarily use under like circumstances; that the amount of care required depended upon the risk of danger; and explained the circumstances which bore on that question. He charged, in short, that the obligations, rights, and duties of railroads and travelers upon highways crossing them are mutual and reciprocal, and no greater degree of care is required of the one than of the other.

Mr. Justice Bradley said: "If a railroad crosses a common road on the same level, those traveling on either have a legal right to pass over the point of crossing, and to require due

care on the part of those traveling on the other, to avoid a collision. Of course, these mutual rights have respect to other relative rights subsisting between the parties. From the character and momentum of a railroad train, and the requirements of public travel by means thereof, it cannot be expected that it shall stop and give precedence to an approaching wagon to make the crossing first. It is the duty of the wagon to wait for the train. The train has the preference and right of way. But it is bound to give due warning of its approach, so that the wagon may stop and allow it to pass, and to use every exertion to stop if the wagon is inevitably in the way. Such warning must be reasonable and timely. But what is reasonable and timely warning may depend on many circumstances. * * * On the other hand, those who are crossing a railroad track are bound to exercise ordinary care and diligence to ascertain whether a train is approaching. * * * We think the judge was perfectly right, therefore, in holding that the obligations, rights, and duties of railroads and travelers upon intersecting highways are mutual and reciprocal, and that no greater degree of care is required of one than of the other; for, conceding that the railway train has the right of precedence in crossing, the parties are still on equal terms as to the exercise of care and diligence in regard to their relative duties. The right of precedence referred to does not impose upon the wagon the whole duty of avoiding a collision. It is accompanied with, and conditioned upon, the duty of the train to give due and timely warning of approach. The duty of the wagon to yield precedence is based upon this condition. Both parties are charged

Nor was there error in respect of the question of damages. What the trial judge said on that subject, taken together, was not incorrect ; and, if the railway company had desired particular instructions in reference to the measure of damages, it should have requested them, which it did not do. *Railway Co. v. Volk*, 151 U. S. 73, 14 Sup. Ct. 239.

Judgment affirmed.

Opinion by MR. CHIEF JUSTICE FULLER.

WALKER v. NEW MEXICO AND SAN PEDRO RAILROAD COMPANY.

United States Supreme Court, March, 1897.

OVERFLOW OF SURFACE WATER — EMBANKMENT — COMMON LAW.—

The common law prevailing in New Mexico, that the lower landowner of property owes no duty to the upper landowner in respect to surface water, an action will not lie against a railroad company for erecting an embankment on its land by which an overflow of surface water damages the land of plaintiff.

The doctrine of the civil and common law *distinguished*.

IN ERROR to the Supreme Court of the Territory of New Mexico.

On November 3, 1886, A. C. Walker commenced this action in the District Court of the Second Judicial District of the territory of New Mexico, in and for the county of Socorro against the railroad company, defendant, to recover damages resulting from an overflow of his lands, caused, as charged, by a wrongful obstruction of a natural watercourse. Subsequently, an amended declaration was filed, and after the death of A. C. Walker the action was revived in the name of his administratrix, the present plaintiff in error. After some

with a mutual duty of keeping a careful lookout for danger; and the degree of diligence to be exercised on either side is such as a prudent man would exercise under the circumstances of the case in endeavoring fairly to perform his duty. * * * The mistake of the defendant's counsel consists in seeking to impose upon the wagon too exclusively the duty of avoiding collision, and to relieve the train, too, entirely from responsibility in the

matter. Railway companies cannot expect this immunity so long as their tracks cross the highways of the country upon the same level. The people have the same right to travel on the ordinary highways as the railway companies have to run trains on the railroads."

The case was reaffirmed, quoted from, and followed in *Railroad Co. v. Griffith*, 159 U. S. 603, 16 Sup. Ct. 105.

preliminary proceedings, a trial was had in December, 1892, on which trial the jury returned a general verdict, finding the defendant guilty, and assessing the plaintiff's damages at \$9,212.50. At the same time the jury returned, in response to certain questions submitted by the court, special findings of fact. The trial court, overruling all other motions, entered a judgment in favor of the defendant, on the ground that the special findings of fact were inconsistent with and controlled the general verdict, and that upon such findings of fact the defendant was entitled to judgment. The case was thereafter taken to the Supreme Court of the territory, by which court, on August 26, 1893, the judgment was affirmed (reported in 34 Pac. Rep. 43), and thereupon the plaintiff sued out this writ of error.

NEILL B. FIELD, for plaintiff in error.

ROBERT DUNLAP, for defendant in error.

The testimony was not preserved, and the case is submitted to us upon the pleadings, the verdict, the special findings of fact, and the judgment; and on the record as thus presented, plaintiff in error rests her claim of reversal upon three propositions:

First. That the act of the territorial legislature, authorizing special findings of fact and providing for judgment on the special findings, if inconsistent with the general verdict (Laws New Mex. 1889, c. 45, p. 87), is in contravention of the seventh amendment of the Constitution of the United States, which reads: "In suits at common law, where the value in controversy shall exceed \$20, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any court of the United States than according to the rules of the common law."

Second. That there is no such conflict between the general verdict and the special findings as authorized a judgment contrary to the general verdict.

And, *third*, that if there be any conflict between the special findings and the general verdict, the special findings are so inconsistent with each other as to neutralize and destroy themselves.

The court reviewed the points upon the first proposition and were clearly of the opinion that this territorial statute does not infringe any constitutional provision, and that it is within the power of the legislature of a territory to provide that on a trial of a common-law action the court may, in addition to the general verdict, require specific answers to special interrogatories; and, when a conflict is found between the two, render such judgment as the answers to the special questions compel.

For a full understanding of the second question it is necessary to notice the pleadings. The original declaration — after stating that

the Rio Grande river runs in its regular channel about half a mile east of the plaintiff's premises, and that the waters from rainfalls pass and flow in their natural fall from the surrounding and adjacent country over the plaintiff's and other lands in the vicinity and empty into the river, and that by that means the surface water, up to the time of the grievances complained of, had been carried off without injury to the plaintiff, or his property — charged that on May 1, 1885, the defendant, in and by the construction of its roadbed, did dam and close up all of the natural and usual outlets and places through which the surface water had been accustomed to make its escape, thereby causing such surface water theretofore flowing to the river as aforesaid to be dammed up and set back upon the premises of the plaintiff and other property owners; that on September 7, 1886, there was a heavy rainfall; and the surface water, unable, by reason of the obstruction, to reach the river, was set back on the premises of the plaintiff, making a lake or pond of waters three to four feet in depth, and doing great injury to his property. A demurrer to this declaration having been sustained, an amended declaration was filed, which, omitting all reference to rainfalls and surface water, charged that the defendant obstructed the natural and artificial watercourses by which the waters from the north and west of the plaintiff's property, and from the Socorro and Magdalena mountains, in their natural flow and fall, passed over the lands of the plaintiff and other lands, and emptied into the Rio Grande. A demurrer to this declaration having been overruled, the plaintiff was directed to file a bill of particulars showing the places and courses of the alleged natural and artificial water courses, and did so, describing three or four beds or channels through which, in a natural fall, as he averred, the waters passed from the Socorro and Magdalena mountains into the Rio Grande.

Now the contention of the defendant in error is that it is apparent, from the answers given to the special questions, that there were no natural water courses obstructed by defendant's roadbed, and that the water which did the damage was simply surface water. The second, third, fourth and fifth are as follows:

"Q. 2. Was there a cloudburst in the Magdalena or Socorro mountains on September 8, 1886; and, if so, was the water therefrom the water which ran over plaintiff's land? A. Yes.

"Q. 3. Was the water which came down the arroyos from the Magdalena and Socorro mountains on September 8, 1886, surface water? A. Yes.

"Q. 4. Was it customary for water to collect and stand on

plaintiff's land, and land in the immediate vicinity thereof, in the times of heavy rains or floods? A. No.

"Q. 5. How often, upon an average in any one year, did the water come down the arroyos leading toward the valley in the vicinity of Socorro from the Magdalena and Socorro mountains prior to September 8, 1886? A. According to the rain which fell."

This is very clear. There was a cloudburst in the mountains, and it was the water from that which did the damage. It was simply surface water. And the arroyos through which the water flowed after leaving the mountains were not running streams—natural water courses—but simply passageways for the rain which fell. Counsel for plaintiff in error, not questioning that the injury done to the property of their client was by surface water—the large fall which came from the cloudburst in the Socorro or Magdalena mountains on September 8, 1886—insists that it does not appear that such cloudbursts were unusual, and also that there had been created through the lapse of years distinctive channels by which the waters from the mountains passed down to the river, and that the railroad embankment operated to obstruct such channels; that, although these channels were but the beds of constantly flowing streams, they were wrought by natural processes, and through the flowing of water, not continuous, but at frequent intervals, until they had become natural outlets for the often-accumulating waters in the Socorro and Magdalena mountains.

It is obvious not only that it was mere surface water whose flow was obstructed, not only that no natural water courses were filled up, but also that the channels which were obstructed were not such ravines, gorges and outlets as in a mountainous district must be left open to prevent the forming of lakes and reservoirs therein, but simply the ordinary ditches and passageways, which surface water will cut in a generally level district in its effort to reach some flowing stream. It also appears from the answer to the twenty-fifth question that the railroad embankment was constructed before the buildings of the plaintiff. It will be borne in mind that the mountains from which this surface water flowed were from four to eighteen miles distant, and from the foot of those mountains to the Rio Grande river, naturally, the flowing water had dug channels and ditches through such portions of the soil as afforded the least obstruction to its passage, and such channels and ditches were all that the railroad embankment in any way obstructed.

Does a lower landowner, by erecting embankments, or otherwise preventing the flow of surface water onto his premises, render himself liable to an upper landowner for damages caused by the stopping of

such flow? In this respect the civil and common law are different, and the rules of the two laws have been recognized in different states of the Union; some accepting the doctrine of the civil law, that the lower premises are subservient to the higher, and that the latter have a qualified easement in respect to the former — an easement which gives the right to discharge all surface water upon them. The doctrine of the common law, on the other hand, is the reverse — that the lower landowner owes no duty to the upper landowner; that each may appropriate all the surface water that falls upon his own premises; and that the one is under no obligation to receive from the other the flow of any surface water, but may, in the ordinary prosecution of his business, and in the improvement of his premises, by embankments or otherwise, prevent any portion of the surface water coming from such upper premises (1).

If a case came to this court from one of the states in which the doctrine of the civil law obtains, it would become our duty, having respect to this which is a matter of local law, to follow the decisions of that state. And in like manner we should follow the adverse ruling in a case coming from one of the states in which the common-law rule is recognized. New Mexico is a territory, but in it the legislature has all legislative power except as limited by the Constitution of the United States and the organic act and the laws of congress appertaining thereto. There it was enacted in 1876 (Laws New Mex. 1876, p. 31, c. 2, § 2), that "in all courts in this territory the common law as recognized in the United States of America shall be the rule of practice and decision." *Browning v. Browning*, 9 Pac. Rep. 677, 682. The legislature of New Mexico having thus adopted the common law as the rule of practice and decision, and there being no special statutory provisions in respect to this matter, it is not to be wondered at that the Supreme Court of the territory, in its opinion in the present case, disposed of this question in this single sentence: "If the act of the territorial legislature of 1889 is constitutional, then we can find no error in the action of the court in setting aside the general verdict, and entering judgment upon the special findings." Obviously, the only question deemed of any moment by that court was the question in respect to the matter of special findings.

It may be proper to notice that the exception suggested by *Beasley*, C. J., in *Bowlsby v. Speer*, 31 N. J. Law, 351, 353, in these words: "How far it may be necessary to modify this general proposition in

1 Citing *Railroad Co. v. Hammer*, Kan. 374, 6 Pac. Rep. 581; *Hoyt v.*
22 Kan. 763; *Gibbs v. Williams*, 25 Hudson, 27 Wis. 656.
Kan. 214; *Railroad Co. v. Riley*, 33

cases in which, in a hilly region, from the natural formation of the surface of the ground, large quantities of water, in times of excessive rains, or from the melting of heavy snows, are forced to seek a channel through gorges or narrow valleys, will probably require consideration when the facts of the case shall present the question;” has no application to the case before us, for, as appears from the findings, the mountainous district from which these waters flowed was from four to eighteen miles distant from the place of the embankment and the damage. We must, therefore, overrule the second contention made by counsel for plaintiff in error.

The third requires little notice. It does not seem as though there were any particular inconsistency between the various special findings. The only one that deserves any notice is that which is suggested by the first question and the answer thereto, as follows:

“Q. 1. At the time of the injury complained of, did any of the water flow or run over the plaintiff’s land, except the water which fell from the clouds as rain? A. It did run.”

It is a little difficult to understand exactly what is meant by this. It may be that the jury meant that the water came from the cloudburst, as distinguished from an ordinary rainfall, or it may be that their purpose was simply to affirm that this water coming down the arroyos did run over the land of the plaintiff. Considering the uncertainty as to the import of this question and answer and in view of the clear and positive answers to other direct questions, and also in view of the averments in the original declaration, we think it would be going too far to hold that this is to be taken as a finding that there was a natural water course, whose waters, increased by the rainfall and cloudburst, overflowed their banks, and injured the plaintiff’s property. These are all the questions in the case, and, finding no error in the record, the judgment is affirmed.

Opinion by MR. JUSTICE BREWER.

SENTELL v. NEW ORLEANS AND CARROLLTON RAILROAD COMPANY.

United States Supreme Court, April, 1897.

DOG KILLED ON RAILROAD TRACK — PLAINTIFF GOVERNED BY ORDINANCES.—In order to entitle plaintiff to recover damages for the alleged negligent killing of his dog by the defendant company he must show a compliance with the law of the State and the ordinances of the city as a condition precedent to recover.

STATE LAW — DOG TAX.—A law of the State of Louisiana, and a city ordinance in accordance therewith, as to taxation of dogs, is constitutional.

IN ERROR to the Court of Appeals for the Parish of Orleans in the State of Louisiana.

This was an action originally instituted by Sentell in the Civil District Court for the parish of Orleans, to recover the value of a New-foundland bitch, known as "Countess Lona," alleged to have been negligently killed by the railroad company.

The company answered, denying the allegation of negligence, and set up as a separate defense that plaintiff had not complied either with the requirements of the State law, or of the city ordinances, with respect to the keeping of dogs, and was, therefore, not entitled to recover. The law of the State was as follows:

"Section 1. Be it enacted by the general assembly of the State of Louisiana, that sec. (1201) twelve hundred and one of the Revised Statutes of Louisiana be amended and re-enacted so as to read as follows: From and after the passage of this act, dogs owned by citizens of this State are hereby declared to be personal property of such citizens, and shall be placed on the same guarantees of law as other personal property: provided, such dogs are given in by the owner thereof to the assessor.

"Sec. 2. Be it further enacted," etc., "that no dog shall be entitled to the protection of the law unless the same shall have been placed upon the assessment rolls.

"Sec. 3. Be it further enacted," etc., "that in civil actions for the killing of or for injuries done to dogs, the owner cannot recover beyond the amount of the value of such dog or dogs, as fixed by himself in the last assessment preceding the killing or injuries complained of.

"Sec. 4. Be it further enacted," etc., "that all laws in conflict with this act be repealed.

"Approved July 5, 1882."

By the city ordinance, adopted July 1, 1890, No. 4613, "no dog shall be permitted to run or be at large upon any street, alley, highway, common or public square within the limits of the city of New Orleans; provided that this section shall not apply to any dog to which a tag, obtained from the treasurer, is attached." By section 8 the treasurer was directed to furnish metal tags to all persons applying for the same at the rate of \$2 each, available only for the year in which they were issued.

Plaintiff denied the constitutionality of the State act; and the court charged the jury that the fact that the dog was not tagged, as required by the city ordinances, could not affect the right of the

plaintiff to recover; that the above act of the legislature was unconstitutional, as destructive of the right of property; and that, a dog being property, a law which requires that property should not be protected unless listed for taxation, was in conflict with the Constitution of the United States, providing that no person shall be deprived of his life, liberty or property without due process of law. The jury returned a verdict in favor of the plaintiff for \$250, upon which judgment was entered.

The case was carried to the Court of Appeals, which reversed the judgment of the trial court, and entered judgment in favor of the defendant, holding that plaintiff should have shown a compliance with the law of the State and the ordinances of the city as a condition precedent to recover. Whereupon plaintiff sued out a writ of error from this court.

GEORGE DENEGRE, for plaintiff.

HENRY P. DART, for defendant.

This case turns upon the constitutionality of a law of the State of Louisiana, requiring dogs to be placed upon the assessment rolls, and limiting any recovery by the owner to the value fixed by himself for the purpose of taxation.

The dog in question was a valuable Newfoundland bitch, registered in the American Kennel's stud book, and was kept by her owner for breeding purposes. It seems that, while following him in a walk upon the streets, she stopped on the track of the railroad company, and, being otherwise engaged for the moment, failed to notice the approach of an electric car which was coming towards her at great speed; and being, moreover, heavy with young, and not possessed of her usual agility, she was caught by the car and instantly killed. The Court of Appeals was evidently of opinion that her owner, knowing of her condition, should not have taken her upon a public thoroughfare without exercising the greatest care and vigilance, and that the accident was largely due to a want of prudence upon his part. The facts, however, were not properly before the court, and the opinion was put upon the ground that the State law was constitutional and valid as a police regulation to prevent the indiscriminate owning and breeding of worthless dogs. The judges also annexed a certificate that the decision was reversed upon the ground that the law was constitutional, and that no other point was passed upon.

By the common law, as well as by the law of most, if not all, the States, dogs are so far recognized as property that an action will lie for their conversion or injury, 2 Black. Comm. 393; *Cummings v. Perham*, 1 Metc. (Mass.) 555; *Kinsman v. State*, 77 Ind. 132; *State v. McDuffie*, 34 N. H. 523; *Parker v. Mise*, 27 Ala. 480; *Wheatley v.*

Harris, 4 Sneed 468; *Dodson v. Mock*, 4 Dev. & B. 146; *Perry v. Phipps*, 10 Ired. 259; *Lentz v. Stroh*, 6 Serg. & R. 34; although in the absence of a statute, they are not regarded as the subjects of larceny, 2 Bish. Cr. Law, sec. 773; *Case of Swans*, 7 Coke, 86, 91; *Norton v. Ladd*, 5 N. H. 204; *Findlay v. Bear*, 8 Serg. & R. 571; *People v. Campbell*, 4 Parker, Cr. R. 386; *State v. Doe*, 79 Ind. 9; *Ward v. State*, 48 Ala. 161; *State v. Lymus*, 26 Ohio St. 400; *State v. Holder*, 81 N. C. 527.

The very fact that they are without the protection of the criminal laws shows that property in dogs is of an imperfect or qualified nature, and that they stand, as it were, between animals *feræ naturæ*, in which, until killed or subdued, there is no property and domestic animals, in which the right of property is perfect and complete. They are not considered as being upon the same plane with horses, cattle, sheep and other domesticated animals, but rather in the category of cats, monkeys, parrots, singing birds and similar animals, kept for pleasure, curiosity or caprice. They have no intrinsic value, by which we understand a value common to all dogs as such, and independent of the particular breed or individual. Unlike other domestic animals, they are useful neither as beasts of burden, for draught (except to a limited extent), nor for food. They are peculiar in the fact that they differ among themselves more widely than any other class of animals, and can hardly be said to have a characteristic common to the entire race. While the higher breeds rank among the noblest representatives of the animal kingdom, and are justly esteemed for their intelligence, sagacity, fidelity, watchfulness, affection, and, above all, for their natural companionship with man, others are afflicted with such serious infirmities of temper as to be little better than a public nuisance. All are more or less subject to attacks of hydrophobic madness.

As it is practically impossible by statute to distinguish between the different breeds, or between the valuable and the worthless, such legislation as has been enacted upon the subject, though nominally including the whole canine race, is really directed against the latter class, and is based upon the theory that the owner of a really valuable dog will feel sufficient interest in him to comply with any reasonable regulation designed to distinguish him from the common herd. Acting upon the principle that there is but a qualified property in them, and that, while private interests require that the valuable ones shall be protected, public interests demand that the worthless shall be exterminated, they have, from time immemorial, been considered as holding their lives at the will of the legislature, and properly falling within the police powers of the several States.

Laws for the protection of domestic animals are regarded as having but a limited application to dogs and cats; and, regardless of statute, a ferocious dog is looked upon as *hostis humani generis*, and as having no right to his life which man is bound to respect. *Putnam v. Payne*, 13 Johns. 312; *Hinckley v. Emerson*, 4 Cow. 351; *Brown v. Carpenter*, 26 Vt. 638; *Woolf v. Chalker*, 31 Conn. 121 (1); *Brent v. Kimball*, 60 Ill. 211 (2); *Maxwell v. Palmerton*, 21 Wend. 407 (3).

Although dogs are ordinarily harmless, they preserve some of their hereditary wolfish instincts, which occasionally break forth in the destruction of sheep and other helpless animals. Others, too small to attack these animals, are simply vicious, noisy and pestilent. As their depredations are often committed at night, it is usually impossible to identify the dog or to fix the liability upon the owner, who, moreover, is likely to be pecuniarily irresponsible. In short, the damages are usually such as are beyond the reach of judicial process, and legislation of a drastic nature is necessary to protect persons and property from destruction and annoyance. Such legislation is clearly within the police power of the State. It ordinarily takes the form of a license tax, and the identification of the dog by a collar and tag, upon which the name of the owner is sometimes required to be engraved, but other remedies are not uncommon.

In Louisiana there is only a conditional property in dogs. If they are given in by the owner to the assessor, and placed upon the assessment rolls, they are entitled to the same legal guaranties as other personal property, though in actions for their death or injury the owner is limited in the amount of his recovery to the value fixed by himself in the last assessment. It is only under these restrictions that dogs are recognized as property. In addition to this, dogs are required by the municipal ordinance of New Orleans to be

1. *Woolf v. Chalker*, 31 Conn. 121, is reported in 1 Am. Neg. Cas. 65.

2. *Brent v. Kimball*, 60 Ill. 211, is reported in 1 Am. Neg. Cas. 98.

3. The court cited the following authorities bearing on the constitutionality of the tax in other States: *Tower v. Tower*, 18 Pick. (Mass.) 262; *Morey v. Brown*, 42 N. H. 373; *Carter v. Dow*, 16 Wis. 317; *Mitchell v. Williams*, 27 Ind. 62; *Haller v. Sheridan*, 27 Ind. 494; *Blair v. Forehand*, 100 Mass. 136; *Morewood v. Wakefield*, 133 Mass. 240; *Ex parte Cooper*, 3 Tex. App. 489; *Tenny v. Lenz*, 16 Wis. 566,

1 Am. Neg. Cas. 260; *Jenkins v. Balantyne*, 8 Utah, 245.

The only case to the contrary to which the court's attention was called is that of *Mayor, etc. v. Meigs*, 1 MacArthur, 53, "in which a city ordinance of Washington, requiring the owner of dogs to obtain a license for the keeping of the same, was held to be illegal. The substance of the opinion seems to be that if the dog be a species of property, which was conceded, it is entitled to the protection of other property, and the owner should not be required to obtain a license for keeping the same."

provided with a tag, obtained from the treasurer, for which the owner pays a license tax of \$2. While these regulations are more than ordinarily stringent, and might be declared to be unconstitutional, if applied to domestic animals generally, there is nothing in them of which the owner of a dog has any legal right to complain. It is purely within the discretion of the legislature to say how far dogs shall be recognized as property, and under what restrictions they shall be permitted to roam the streets. The statute really puts a premium upon valuable dogs, by giving them a recognized position, and by permitting the owner to put his own estimate upon them.

There is nothing in this law that is not within the police power, or of which the plaintiff has a right to complain, and the judgment of the Court of Appeals is, therefore, affirmed.

Opinion by MR. JUSTICE BROWN.

NORTHERN PACIFIC RAILROAD COMPANY v. LYNCH.

U. S. Circuit Court of Appeals, Ninth Circuit, February, 1897.

CROSSING RAILROAD TRACK—INSTRUCTIONS.—In an action to recover damages for personal injuries sustained in collision with train at railroad crossing it was held that where instructions are unnecessarily voluminous and are unnecessarily and improperly multiplied upon the same points, it is not permissible to select any particular clause or particular clauses, and consider them, unconnected with their context; in every case the instructions must be taken as a whole, and if so taken, the jury have been fairly instructed in the law governing the particular case, no error in such instructions can be justly affirmed.

IN ERROR to the Circuit Court of the United States for the District of Montana.

CULLEN & TOOLE, for plaintiff in error.

ROSS, CIRCUIT JUDGE — This was an action for damages for personal injuries sustained by the defendant in error by reason of a collision with one of the railroad company's trains in Montana at a point where the railroad track was crossed by a public highway. The case was here once before, and is reported in 16 C. C. A. 151, 69 Fed. Rep. 86. It is conceded that the facts as now presented are substantially the same as those presented on the former hearing. The defendant in error, who was the plaintiff in the court below, lived near the place of the accident, and was familiar with the crossing and with the running of the trains. The country was open

and flat, and the accident occurred upon a clear and quiet day. The plaintiff had been to a blacksmith shop, going by the public road, and had crossed the railroad track in doing so. He returned by the same road, which for some distance ran parallel to the railroad track, and, when he reached a point where the public road curves towards the railroad track to cross it, he saw a freight train approaching upon the main track of the railroad. There was a side track on the side from which the plaintiff was approaching, a distance of eight feet from the main track. Upon seeing the train the plaintiff pulled up his horses, which were trotting along at a five or six-mile gait. He was at this time about thirty-six feet from the main track. He succeeded in getting the team stopped for an instant very close to the track, but the horses, becoming frightened, dashed upon the track, and the wagon was struck by the engine, from which the injuries complained of resulted. There were but two controverted questions in the case—one, the negligence of the railroad company alleged by the plaintiff, and the other the contributory negligence on the part of the plaintiff alleged by the defendant. On the former hearing of the case this court held that the question of the plaintiff's contributory negligence was a question for the jury to determine, under, of course, appropriate instructions. That ruling has become the law of the case, and is not here open to argument. The only questions properly presented upon the present hearing relate to the giving and refusal to give by the court certain instructions to the jury. The case was a very simple one, requiring very few instructions; and yet a large number were requested by both plaintiff and defendant, many of which were given by the court, and some of which were refused. It would have been in this, as in all similar cases, far better for the court to have given a few terse and pointed instructions upon the subject of what constituted negligence upon the part of the defendant and contributory negligence upon the part of the plaintiff, with instructions as to the proper consequences to flow from the findings of the jury upon those questions. Still, where instructions are unnecessarily voluminous, and are unnecessarily and improperly multiplied upon the same points, it is not permissible to select any particular clause or particular clauses, and consider them, unconnected with their context. In every case the instructions must be taken as a whole, and if so taken, the jury have been fairly instructed in the law governing the particular case, no error in such instructions can be justly affirmed. A careful consideration of the instructions given by the court below in the present case leads to the conclusion that the law properly applicable to the case was clearly enough given,

and that the defendant in error could not have been prejudiced by them, or by the refusal to give others. The court below instructed the jury that under the statute of Montana it was the duty of the defendant company, in approaching the crossing in question, to sound the whistle and ring the bell within not less than fifty nor more than eighty rods from the crossing, and that a failure on the part of the employees of the defendant company in charge of the train that inflicted the injury to the plaintiff to do so would constitute negligence on the company's part for which the company would be liable, in the absence of contributory negligence on the part of the plaintiff, and that it was for the jury to say whether the evidence showed that the defendant was guilty of negligence in not giving proper notice of the approach of its train to the crossing, or in letting off steam from the boiler, or in not exerting proper efforts to stop the train upon discovering the imminent peril of the plaintiff. And, concerning the question of contributory negligence, the court instructed the jury, among other things, that if they should find from the evidence that the plaintiff was familiar with the crossing in question and its dangers (the evidence showing that he lived within a few hundred feet of it, and had so resided for many years), and that, under the circumstances appearing, he knew, or, as an ordinarily prudent man, ought to have known, the time when the train which did the damage was due, or that he knew, or, as an ordinarily prudent man ought to have known, that trains were frequently passing over the crossing in question, and that in approaching the crossing on the occasion of the accident he failed to act as a prudent and cautious man should have acted, or that he omitted precautions that a prudent man ought to have taken, whereby he was injured, he could not recover from the defendant company; that it was incumbent upon the plaintiff to use all his faculties of seeing and hearing, and to listen, and also to look both ways to see if a train was approaching, and that it was his duty to approach the crossing cautiously and carefully, and to do everything that a reasonable man would do before he attempted to cross the railroad track. The jury were further instructed to—

“ Note the character of the crossing; the fact that there was no difficulty of observation along the line of the railroad track; the time of day, and the probable danger from passing trains; the character of the weather; the fact that other persons, situated at a greater distance from the approaching train than the plaintiff, heard the whistle blow, and heard the rumble of the train as it approached — and every fact and circumstance bearing on the case to clearly influence the plaintiff's conduct then and there, under those

circumstances, and say, upon your fair and impartial judgment, whether he acted as a man of ordinary prudence should have acted, and with the due care and caution demanded by the exigencies of the occasion. If he did not so act, the railroad company is entitled to your verdict, whether it was negligent or not."

The court, in another place, told the jury that to constitute contributory negligence there must be a want of ordinary care on the part of the plaintiff, and a proximate connection between that and the injury. We are of opinion that the plaintiff in error has no valid ground to complain that the jury was not sufficiently instructed upon the question of contributory negligence.

In the course of its charge the court below said:

"The defendant railroad company presents two theories as to how this injury occurred: One is that plaintiff, Lynch, was driving his team down to the said crossing, intending to cross the same ahead of the train, and did not calculate accurately the speed of the train, and, on account of this miscalculation, got injured. The other is that plaintiff approached the railroad crossing without having examined the railroad, and for some reason was oblivious of the approach of the train until it was upon him."

Counsel for the plaintiff in error assert that there was "absolutely nothing either in the pleadings or the proof upon which to base" this statement, and they contend that it constitutes reversible error. The record does not sustain counsel's assertions in this respect, for in the defendant's answer it is alleged that:

"The said plaintiff, wholly disregarding his duty as an ordinarily prudent man, recklessly, carelessly and negligently drove his horses, with a wagon attached thereto, up to and upon said railroad track, and attempted to make said crossing, and caused the collision which resulted in the accident complained of."

This allegation clearly justifies the statement made by the court that one of the theories of the defendant was that it was the intention of the plaintiff to cross the track ahead of the train, but that he miscalculated its speed, and as a consequence was injured. Further justification for that statement is found in the testimony of the plaintiff himself, and also in that of the witness McGowan, where they give it as their impression that the plaintiff struck one of his horses with the line just before the engine reached the crossing, in order to get across the track ahead of the train. In the cross-examination of the witness Bowling, the defendant brought out this statement from the witness:

"There was nothing to obstruct the view between me and the accident, and nothing to prevent Mr. Lynch from seeing the train.

I did not see him turn his head to look for the train, and he did not stop at any point to listen for it until he stopped near the edge of the rail."

And the witness Welsh, upon cross-examination by the defendant, testified:

"If I had been looking for the train, I could have seen it coming for a couple of miles. It was a clear, nice day; no wind blowing, to speak of. After leaving the culvert the team was traveling at about the same speed as when I saw them. They were trotting. Mr. Lynch seemed to be looking straight ahead, at his horses. The horses trotted up to within a short distance of the side track. I think they had their heads close over the rails when they stopped. They stopped merely an instant. Just stopped good when they made a jump."

This testimony, brought out by the defendant, would seem to justify the court in stating that one of the theories of the defendant was that the plaintiff seemed oblivious to the approach of the train until it was upon him.

The judgment is affirmed.

BUNKER HILL AND S. MINING AND CONCENTRATING COMPANY v. SCHMELLING.

U. S. Circuit Court of Appeals, Ninth Circuit, February, 1897.

EMPLOYEE INJURED IN MINE—FELLOW-SERVANT—INSTRUCTION.—

Where an employee was injured by the fall of ore in a mine due to alleged negligence of the employer's shift boss and the defense was that the negligence, if any, was that of a fellow-servant, an instruction that the duty of defendant to furnish plaintiff with a safe place to work could not be delegated to an agent was proper, and did not take from the jury the consideration of the doctrine of fellow-servants.

IN ERROR to the Circuit Court of the United States for the District of Idaho.

W. B. HEYBURN and JOHN GARBER, for plaintiff in error.

ALBERT ALLEN, for defendant in error.

This was an action for damages growing out of personal injuries sustained by the defendant in error, who was plaintiff in the court below, alleged to have been sustained by him by reason of the negligence of the plaintiff in error, who was defendant below. The plaintiff was employed as a laborer in the defendant's Bunker Hill

Mine, and at the time of the accident was engaged in shoveling ore in the Williams stope of that mine, alleged in the complaint to consist of a large chamber about two hundred feet in length, about one hundred feet in width, and from a few feet to thirty or forty feet in height. The complaint alleged that on February 16, 1894, the defendant had a large number of men, including the plaintiff, employed in extracting ore from the Williams stope, by reason of which it was the duty of the defendant to keep and maintain the stope in good and safe condition; that on and prior to February 16, 1894, the defendant carelessly and negligently mined out the ores and rock from the stope in question, carelessly and negligently leaving great masses of overhanging rocks and ore with scarcely any support, and in such condition that they were liable to fall at any moment, and that by reason thereof the stope became and was a dangerous place for persons to work, which fact, by the use of reasonable care and prudence on the part of the defendant, ought to have been known to it, and, in fact, was so known; that on February 16, 1894, the defendant, through its officers and agents having charge of the works, well knowing that the Williams stope was an unsafe and dangerous place for persons to work, and well knowing that the overhanging rocks and ore were not well supported, and were liable to fall at any moment, carelessly and negligently required and directed the plaintiff to work therein at shoveling rock and ore; and that while so engaged, without any fault or negligence on the part of the plaintiff, and without any knowledge on his part that the place was dangerous, a large quantity of the rock and ore from the roof of the stope fell upon the plaintiff, seriously injuring him.

The answer of the defendant admitted the employment of the plaintiff as alleged by him, denied the extent of the Williams stope as alleged, but admitted that it was about 200 feet in length, about 58 feet in width, and from 7 to 10 feet in height, and had been made by the defendant in extracting ores therefrom. It admitted that on February 16, 1894, it was engaged in mining and extracting ore from the Williams stope, and had engaged and employed therein a large number of men, including the plaintiff; and that by reason thereof it became and was the duty of the defendant to keep and maintain that stope in as good and safe a condition as it was possible to keep and maintain the same, so that such persons so employed would not be subject to danger. And the defendant alleged that on the said February 16, 1894, and at all the times mentioned in the complaint, the defendant exercised great care in examining and in inspecting the mine for the purpose of keeping and maintaining the same, and every part thereof, including the

Williams stope, in safe condition, in order to avoid all possible danger to its employees; that such examination and inspection was made by competent and skilful miners employed by the defendant for the purpose, and that the miners so employed determined that the stope in question was safe, and free from danger, and that there was nothing in or about it from which the most skilful and careful miner or workman, including the plaintiff, could reasonably expect or anticipate any danger. The answer denied all the allegations of negligence charged in the complaint, and alleged that the ore in the Bunker Hill Mine is in the ledge in large masses or ore bodies, in extracting which it is necessary to excavate large chambers; that, after blasting for the purpose of breaking down the ore in the chambers, the defendant at all times, acting through skilful and competent men, made careful and thorough examinations and inspections of the rock and ore surrounding the excavations, and at all times, including February 16, 1894, took every care and precaution to protect its employees, and to prevent injury to them, and that the fall of the rock which caused the accident to the plaintiff could not be foreseen or provided against by the most skilful and careful inspection, and was not the result of any fault or negligence on the part of the defendant. The answer further alleged that at the time of the accident to the plaintiff the stope in question was in as safe a condition as it was possible under the most skilful supervision of competent miners to keep it; that the plaintiff was accustomed to working in mines of a similar character to that of the defendant, and was competent to judge of the safety of the stope where he was working; that the risk of working therein was assumed by him as a part of his employment, with the full knowledge of the condition thereof; that the walls of the stope in question were sound, solid and well supported at all times, and that no rock or other substance at any time fell from either the roof or walls of the stope; that whatever rock did fall in the mine consisted of ore, and fell from the breast of the stope, and not elsewhere, and did not amount altogether to over ten or fifteen tons in quantity; that the persons whose immediate duty it was, and upon whom the responsibility rested, to keep the mine in a safe and proper condition at the point wherein the plaintiff was working at the time of his injuries, were all fellow-servants of the plaintiff.

The trial of the case resulted in a verdict for the plaintiff. The record shows that the night before the accident one of the witnesses for the plaintiff called the attention of the night-shift boss to the cracks in the ore and rocks in the roof of the chamber where the accident occurred; and the principal point made at the oral argument

in behalf of the plaintiff in error was that the neglect of the shift boss to properly support the roof, after his attention had been thus called to the cracks in it, was the neglect of a fellow-servant of the plaintiff, which neglect was, in effect, withdrawn from the consideration of the jury by the instructions of the court below to the effect that the duty devolved upon the defendant company to provide the plaintiff with a reasonably safe place in which to work, and that that duty could not be devolved upon an agent so as to exonerate the defendant from liability for neglect in that regard. In a subsequent portion of its charge the court instructed the jury as follows:

"In employment such as stoping ore from mines in large stopes, such as are shown to exist in the mines of the defendant where the injury is alleged to have occurred, it is to be expected that the danger to the workmen will be greater at some times than at others. From the very nature of the work, the obligation of the employer to provide a reasonably safe place for his employees to work upon and in does not oblige him to keep the place where they are employed in such occupation as stoping ore from the mines in a safe condition at every moment of their work, so far as its safety depends upon a due performance of their work by them or their fellow-servants. That is a request which the defendant asks. I give it, with this explanation. To illustrate: You have seen by the testimony here that this work is carried on by cutting off slabs of ore from the roof of the stope. It is cut down in benches or in blocks. They start and stope along, and here is a block of ore standing square, I presume like that; here is the floor running along in this direction; up above here is the ore. Now, you must see that there are times when everything cannot be absolutely safe, cannot be kept as safe at one time as at another. For instance, when that block of ore is being cut off, it is more or less without supports under it; for the time being there is more risk there than there would be at other times. Now, that is what that instruction means—simply that there are times when the danger must be greater than at other times, because it necessarily must follow that in mining you cannot keep timber so thick under it that it would be absolutely safe at all times, because that ore must be taken down. It is one of the natural risks that men must incur in mining, that these blocks of ore must be left at some times so they can get them down. That is as far as I mean that instruction to go."

No issue was made in the case in respect to the duty of the defendant to furnish the plaintiff with a safe place in which to work. The complaint alleged that duty on the part of the defendant,

and the answer of the defendant conceded it. The defense made by the answer was that the defendant performed that duty, but that the rock that fell upon the plaintiff and injured him consisted of ore that fell from the breast of the stope, and that the persons whose duty it was, and upon whom the responsibility rested, to keep the mine at that point in a safe condition were fellow-servants of the plaintiff, for whose neglect in that regard the defendant was not responsible; and that the risk of working where he was injured was assumed by the plaintiff as a part of his employment, with full knowledge of all of the surrounding conditions. The record does not contain the evidence in the case. But the court below stated in the portion of its charge above quoted that the testimony showed that the mining was carried on by cutting off slabs of ore from the roof of the stope, and the court proceeded to explain to the jury that when such a block was being cut down it was, of necessity, more or less without supports under it, and that, as a consequence, there was at such times necessarily more risk to the miners than at other times, which risks the miners assumed as one of the incidents of their employment. To this, as far as it goes, the counsel for the plaintiff in error do not object; but they insist that, as the real defense was the neglect of the shift boss to properly support or remove the ore that fell and injured the plaintiff, after having had his attention called to the cracks in it, the defendant was entitled to the benefit of the doctrine applicable to fellow-servants, and that that doctrine was, in effect, withdrawn from the consideration of the jury by the instruction that the duty of the defendant to furnish the plaintiff with a safe place in which to work could not be delegated to an agent. It does not appear from the record what the duties of the shift boss were. He may or may not have been the fellow-servant of the plaintiff, depending, not upon his grade and control over the other members of his shift, but upon the character of the acts he was required to perform. *Railroad Co. v. Peterson*, 162 U. S. 346, 353, 16 Sup. Ct. 843; *Mining Co. v. Whelan*, 12 C. C. A. 225, 64 Fed. Rep. 462, 465, and authorities there cited. If he was such fellow servant, and the accident to the plaintiff happened through his negligence, the defendant was not answerable therefor. And so the court below told the jury; not, it is true, with specific and direct reference to the shift boss, but no such request appears to have been made of the court by the plaintiff in error, nor was the court requested to instruct the jury as to what constituted a fellow-servant of the plaintiff. But the court, in its charge to the jury, did in express terms instruct the jury that among the risks assumed by the servant

is the risk of carelessness on the part of fellow-servants. "The master is not responsible," said the court, "in any instance, for the accidents to a laborer which occurred from the carelessness of another fellow-servant. He is responsible for those acts of some other employee who is a vice principal of a master, or who is his direct agent; but he is not responsible for the accidents that result to him from the carelessness of a co-laborer. So that in this case, if this accident could be traced to the direct carelessness, not of an agent or superior servant, but to some fellow-servant and co-laborer, then the plaintiff would have to assume that himself. Those, now, are among the risks that a laborer assumes in entering into employment—that is, unforeseen accidents that cannot be guarded against, cannot be provided for; and, as I said, the accidents that may result from carelessness of a co-laborer. If this accident resulted from any such causes as I have stated, the plaintiff cannot recover, etc." It cannot be properly held, therefore, that the doctrine applicable to fellow-servants was withdrawn from the consideration of the jury by the instruction that the duty of the defendant, admitted in his answer, to furnish the plaintiff with a safe place in which to work, could not be delegated to an agent.

Another point made on behalf of the plaintiff in error is that the court, against the objection and exception of the plaintiff in error, admitted in evidence a diagram of the stope where the accident occurred, made by one Easton upon the representations of the witness Powers and others as to its appearance after the accident. Powers testified that it was a fair representation of the workings in the stope immediately after the accident, and the court admitted it, in connection with his testimony only as his version of the workings, which the jury might consider for what it was worth. In this we see no error.

Judgment affirmed.

Opinion by Ross, Circuit Judge.

ST. LOUIS AND SAN FRANCISCO RAILWAY COMPANY ET AL. V. MILES.⁽¹⁾

U. S. Circuit Court of Appeals, Eighth Circuit, March, 1897.

KILLED BY TRAIN WHILE WORKING ON TRACK—PROXIMATE CAUSE.—Where an employee of a lumber company while handling lumber

1. See also *St. Louis & S. F. Ry. Co.* arising out of the same accident as the *v. Hicks*, case next reported, an action *Miles' Case*.

on defendant's railroad track, upon a spur track leading to the lumber mill, was struck and killed by one of defendant's trains, the evidence showed that the switch was negligently left open by defendant's servants, the defendant company was liable, as the open switch was the sole cause of the disaster which resulted in plaintiff's death.

IN ERROR to the Circuit Court of the United States for the Western District of Arkansas. The facts appear in the opinion.

L. F. PARKER and B. R. DAVIDSON, for plaintiffs in error.

OSCAR L. MILES, for defendant in error.

THAYER, CIRCUIT JUDGE — This is the second appearance of this case in this court on a writ of error, which was sued out on each occasion by the St. Louis & San Francisco Railway Company et al., the plaintiffs in error, who were the defendants in the trial court. A. F. Miles, as administrator of the estate of James W. Brown, deceased, sued the defendant railroad company and its receivers for negligently causing the death of his intestate at Van Buren, Ark., on November 21, 1893. On the former hearing the case was submitted in connection with two other cases of the same character, which grew out of the same accident. *Railway Co. v. Bennett's Adm'r*, 32 U. S. App. 621, 16 C. C. A. 300, and 69 Fed. Rep. 525; *Railway Co. v. Brown's Adm'r*, 32 U. S. App. 632, 16 C. C. A. 682, and 69 Fed. Rep. 530; *Railway Co. v. Spoon's Adm'r*, 32 U. S. App. 633, 16 C. C. A. 680, and 69 Fed. Rep. 531. The judgment in the case at bar against the defendant railway company was reversed on the former hearing for reasons which are fully stated in *Railway Co. v. Bennett's Adm'r*, *supra*. We quote from the statement in the Bennett Case certain facts disclosed by the present record, which will serve to explain the circumstances under which the injuries resulting in the death of the plaintiff's intestate were sustained:

"The scene of the accident was a spur track of the railway company, which extended from its main track at Van Buren, in the State of Arkansas, between two long lumber sheds that belonged to the Long-Bell Lumber Company. The platforms of these lumber sheds were about four feet high, and the space between them in which the cars ran upon this spur track was about sixteen feet wide. It was about four o'clock in the afternoon of a November day in 1893. A switching engine, with its crew, had entered the spur from the main track for the purpose of moving cars on the former, and the switch had been left open. There were about fourteen freight cars upon the spur track, and between the two sheds there was an opening between two of these cars which had been made before the switching engine came upon the track. This

space was about twenty feet wide. In it the employees of the lumber company had placed a tramway, one end of which rested upon timbers under the platform upon one side of the track, and the other upon the platform upon the other side. When the railway company was not using the spur track, this tramway was used by the lumber company to enable its employees to transfer lumber across the track from one of its sheds to the other. Whenever a switching engine came upon this spur track to move cars it had been the custom for those employees of the lumber company who happened to be nearest to the tramway to immediately jump down upon the railroad track in the space between the cars and push the tramway back under one of the platforms. At the time of this accident there were some box cars between the engine and the space where the tramway was, and about a dozen of them beyond that space. * * * The deceased was an employee of the lumber company. When the switching engine came in upon the spur track he and five other employees of that company jumped down upon the track between the cars, and began to push the tramway back under the platform of the shed. From this hole between the lumber sheds and the platform they could not see a train or engine approaching on the railroad tracks, nor could those approaching upon the tracks see them. * * * While they were in this dangerous situation, a freight train came along the main track at a dangerous rate of speed, ran into the open switch, drove the switching engine and cars in upon the spur track, and the deceased and three of his co-laborers were caught between the cars, and killed."

On the former hearing it did not appear that any of the officers or employees of the defendant company had any knowledge that the Long-Bell Lumber Company, or its employees, had been in the habit of laying the tramway across the spur track between the lumber sheds for the purpose of moving lumber to and fro. Neither did it appear that on the occasion of the accident the presence of the deceased and his fellow-laborers on the spur track between the cars was known to the defendant's employees, or that, while in the situation aforesaid, they could be seen by the servants of the railway company, who were engaged at the time in handling its engines and cars. In view of this state of facts, we held, in the Bennett Case, that, inasmuch as the victims of the accident had voluntarily placed themselves in a position of great danger, where they had no apparent right to be, and that, inasmuch as their presence on the spur track between the cars was unknown to the employees of the railway company, and the latter persons had no reasonable grounds to anticipate their presence at that place, the case disclosed no

breach of duty which the defendant railway company owed to the persons who were engaged in removing the tramway, for which it could be held responsible. The record in the case at bar presents a different state of facts. It now appears that the spur track in question was constructed on land belonging to the Long-Bell Lumber Company several years before the accident occurred, and that it was so constructed by agreement between said lumber company and the defendant railway company for the purpose of enabling the latter company to reach the lumber company's mill and sheds with its cars, and to remove lumber therefrom. The testimony shows that for some years prior to the accident the tramway had been used by the lumber company for the purpose of moving lumber across the spur track, and that this fact was well known to the switching crew who did the switching at that place. Some of the witnesses say, in substance, that the regular switching crew would come to the lumber company's mill, if not every day, at least several days each week, either to set empty cars on the spur track or to remove loaded cars therefrom, and that on such occasions they would notify the employees of the lumber company to remove the tramway whenever they found it obstructing the track. Such, it seems, had been the uniform practice for several years prior to the accident, and no officer or employee of the railway company had ever questioned the right of the lumber company to lay the tramway across the track when it was not being used for switching purposes. In short, it is conceded on both sides that the regular switching crew of the defendant company, whose business it was to set empty cars on the spur track and to remove loaded cars therefrom, were well acquainted for a long time prior to the accident with the practice of the lumber company in this respect.

One of the principal contentions on the part of the railway company is that, even on the state of facts disclosed by the present record, the deceased and his fellow-employees were trespassers on the spur track while they were engaged in the customary way in removing the tramway, and that the railroad company owed them no duty for the breach of which it can be held responsible. We are not able to assent to this view. The spur track was evidently laid for the mutual accommodation of the lumber company and the railway company, and it was not used for the benefit of the public generally. It passed between and in close proximity to two sheds or storehouses forming a part of the lumber company's milling plant, which was in itself notice to the railway company that in the transaction of its business the employees of the lumber company would frequently be compelled to carry lumber across the track from one

storehouse to the other. Besides, we think that the knowledge acquired by the switching crew, while in the discharge of their ordinary duties at that place, that the lumber company was in the habit of laying the tramway across the track, should be imputed to the railway company. The fact that such practice had continued for two or three years, that it was well known to all of the employees of the railway company who had duties to perform on the spur track in question, and that no one had ever objected to such use by the track by the lumber company, should be taken as equivalent to an agreement between the lumber company and the railway company that the tramway might be laid across the track when it was not actually in use by the railway company for hauling its cars.

It results from this view that the servants of the lumber company who were engaged in removing the tramway on the occasion of the accident were in no sense trespassers on the defendant's track. They were where they had a lawful right to be, and in the performance of their ordinary duties. The lumber company and the railway company were in the joint occupancy of the track where the tramway was laid, and the latter company was under no obligation to the employees of the lumber company to exercise ordinary care in moving its engines and cars so as to avoid injuring them. In view of all the circumstances of the case, as above detailed, we are unable to say that the duty which the defendant company owed to the servants of the lumber company who were engaged in the discharge of their duties at the point in question differs in kind from the duty which a railroad company owes to persons at railroad crossings. If there was any difference, it was in the degree or amount of care that ought to have been exercised. That it was bound to take reasonable precautions to avoid injuring them is a proposition, we think, which admits of no controversy.

Counsel for the defendant have indulged in some criticism of the instructions given by the trial court touching the question of contributory negligence, and in some criticism of the manner in which that issue was submitted to the jury; but, from the standpoint from which we view the case, that subject may be eliminated from the discussion. It is manifest that the efficient cause of the death of the men who were removing the tramway — the single act of negligence — consisted in the fact that the switch opening into the main track some distance north of the place where the accident occurred was left open when the switch engine backed into the spur track. The switch was left open by the switching crew, although they well knew that a freight train was approaching rapidly from the north, and would be due at the switch in a few

moments. Under the circumstances, the conduct of the switching crew in leaving the switch open was grossly negligent, and it must be regarded as the sole cause of the death of the plaintiff's intestate. None of the men who were at the time engaged in removing the tramway, and who were subsequently killed, were aware that the switch had been left open, and they cannot be charged with negligence for failing to take precautions to guard against a peril which was unknown to them, and which they had no reason to apprehend. In their exposed situation between the two cars, where they could not be seen, it was doubtless their duty to make their situation known to the driver of the switch engine, if it was not known to him, so as to prevent his moving down upon them of his own volition before the tramway was removed. But such precaution, if it had been taken, would not have prevented the accident in question, as they were not hurt by the voluntary action of the engineer in charge of the switch engine, but solely in consequence of the open switch, which permitted the coming freight train to leave the main track and enter the spur track. We think, therefore, that there was no evidence in the case tending to show contributory negligence, and that this issue might well have been eliminated from the charge. At all events, the defendant company is not entitled to complain of what was said by the trial court on that subject.

Some other errors have been assigned upon the record, and noticed in the brief, but they are without merit, and, in our judgment do not deserve special notice. An inspection of the entire record has served to convince us that the verdict was for the right party, and that no errors were committed which can be regarded as prejudicial to the defendant company. Indeed, considering the undisputed fact that the switch was negligently left open in advance of the approaching train, and that this was the sole cause of the disaster, we do not see how the trial could have resulted differently. The judgment of the Circuit Court is therefore affirmed.

ST. LOUIS AND SAN FRANCISCO RAILWAY COMPANY ET AL. V. HICKS (1.)

U. S. Circuit Court of Appeals, Eighth Circuit, March, 1897.

DEATH — DAMAGES — INSTRUCTION.— An instruction, in action to recover damages for death of plaintiff's intestate, that "nothing can be allowed for the pain and suffering of the deceased, nor can anything be allowed for the grief or distress of any one," remedies any harm that might be done to defendant in permitting plaintiff to show the exact nature of the injuries resulting in his intestate's death.

IN ERROR to the Circuit Court of the United States for the Western District of Arkansas.

L. F. PARKER and B. R. DAVIDSON, for plaintiffs in error.

OSCAR L. MILES, for defendant in error.

THAYER, CIRCUIT JUDGE.— These cases were submitted in connection with the case of *St. Louis & S. F. Railway Co. v. Miles*, 79 Fed. Rep. 257, (2) and upon the same printed record, inasmuch as the cases grew out of the same accident, and involve the same questions. In case No. 793, Harrison Hicks, as administrator of William Spoon, deceased, sued for compensation for pain and suffering sustained by his intestate, as the laws of Arkansas permitted him to do; while in case No. 794 the action was brought by the same administrator for damages sustained by the next of kin. In the latter case a single question is raised, which did not arise in the case of *St. Louis & S. F. Railway Co. v. Miles*, and was not considered in that case. In the course of the trial, counsel for the defendant company took an exception to the admission of certain testimony showing the nature of the injuries received by William Spoon which had resulted in his death. This proof was objected to on the ground that it was unnecessary to show the nature of the injuries received, inasmuch as the next of kin, for whose benefit the action was brought, could not recover in that suit for any pain or suffering which the deceased had endured as a result of the injuries. The exception thus taken has been argued in this court. The trial court permitted the plaintiff to prove the nature of the injuries sustained by the plaintiff's intestate, and that they had occasioned his

1. There were two cases between the same parties decided herewith.

For the facts of the case see *St. Louis & S. F. R'y Co. v. Miles*, pre-

ceding case reported, an action arising out of the same accident.

2. See the preceding case reported.

death; but it charged the jury specially that "nothing can be allowed for the pain and suffering of deceased, nor can anything be allowed for the grief or distress of any one." We think that such action on the part of the trial court was not erroneous, and will not justify a reversal of the case. The plaintiff had a right to show that the deceased had received injuries which resulted in his death. The most that can be said in support of the exception is that the court permitted a material fact to be proven in greater detail than was perhaps necessary. But, whatever possible harm was done in allowing the precise nature of the injuries to be shown was remedied, we think, by the instruction above quoted. It must be presumed that the jury obeyed the instruction of the court, and that the defendant was not prejudiced, although it was unnecessary to show the exact nature of the injuries. The judgment of the Circuit Court in each of the cases must be affirmed.

DELLS LUMBER COMPANY v. ERICKSON.

U. S. Circuit Court of Appeals, Seventh Circuit, May, 1897.

EMPLOYEE INJURED BY DEFECTIVE MACHINERY—MASTER AND SERVANT.—Where plaintiff was engaged to work in defendants' planing mill by defendants' superintendent, but there was another person who attended to the machinery repairs, and plaintiff was injured by defective machinery, of which defect notice had been given, he having been requested to continue to work by the superintendent, it was for the jury to determine whether the superintendent exceeded his authority; and in such case it was not so much what authority the superintendent had but what the employee supposed he had under the circumstances.

IN ERROR to the Circuit Court of the United States for the Western District of Wisconsin. The facts appear in the opinion.

V. W. JAMES and C. PORTER JOHNSON, for plaintiff in error.

T. F. FRAWLEY and A. C. LARSON, for defendant in error.

WOODS, CIRCUIT JUDGE.—John Erickson, the defendant in error, recovered judgment against the Dells Lumber Company, plaintiff in error, for personal injuries sustained in the employment of that company while operating a matcher in the company's planing mill at Eau Claire, Wis., his foot having been caught and crushed between pulleys under that end of the machine near which he was required to be when operating it. The gist of the declaration is that the negligence of the company which caused the injury consisted in omitting to equip the matcher with a spring to hold the

boards being matched against the guides, and in omitting to cover or guard the pulleys; that by reason of the absence of the spring the plaintiff was compelled to press with all his strength against the boards to keep them moving in a straight line under the knives; that, while so engaged, a board broke under his hand, causing him to fall and his foot to be caught between the revolving pulleys. When the evidence was all in, the plaintiff in error moved the court to direct a verdict in its favor, but the motion was denied. Whether that ruling was right is the chief question in the case, and its determination depends upon the inquiry whether the defendant in error should be regarded as having assumed the risk of injury from the unguarded pulleys. That the omission to cover the pulleys, or in some mode to guard the operator of the machine against danger from them, was a breach of the company's duty to provide its employee a safe place in which to work is too clear for controversy; but it is contended that Erickson had become aware of the danger, and that by continuing in the service he assumed the risk. The accident occurred on Tuesday, and it appears that, on the Saturday next preceding, Erickson complained to John Bonk, whom he supposed to be the superintendent of the mill, about the condition of the matcher, and declared his purpose to quit work unless a spring was supplied and the pulleys covered, whereupon Bonk requested him not to quit, and promised that the spring should be supplied and the pulleys guarded. The promise, it is insisted, was not binding upon the company, and was unavailing to Erickson as an excuse for continuing to work under conditions of known danger, because Charles Charlesson, the foreman in the mill, was the one who had charge of the machinery, and determined what repairs and alterations should be made, while Bonk, instead of being the superintendent, was only a fellow-servant of other employees, and possessed of no authority to promise that repairs or additions to the machinery of the mill should be made. Erickson testified that he believed Bonk to be the superintendent, and other witnesses asserted a like understanding. It is undisputed that Bonk had authority and was accustomed to hire and discharge the workmen employed in the planing mill. He hired Erickson and fixed wages, as he did the wages of others, and there are other circumstances in evidence which tended to show that he exercised and had the authority of a superintendent. It was therefore a question for the jury, if the point were controlling, whether he was exceeding his powers when persuading Erickson to continue in a service of which, if he quit, another must have been employed. We are of opinion, however, that the important inquiry was not so much what authority did

Bonk really possess, as what Erickson supposed him to have. If the danger to be avoided had been a newly-developed one, of which the company was without notice, as in the case cited of *Railway Co. v. Benford* (Tex. Sup.) 15 S. W. Rep. 561, where the injury was caused by the going out of an electric light, or in *Holmes v. Clarke*, 6 Hurl. & N. 359, where the fence about dangerous machinery had broken after the injured servant had taken employment, the rule contended for would not be unreasonable, that the servant continuing to work in the face of the new danger should be deemed to assume the risk, regardless of any promise of a fellow servant or of any unauthorized person, to remove the source of danger. In such a case there would be lacking an essential element of liability on the part of the master — notice of the existence of the condition of danger, or such lapse of time as would be equivalent to notice. See *Railroad Co. v. Kenley* (Tenn.) 21 S. W. Rep. 326. In this case there is no question of notice. The ground of the master's liability existed from the beginning, and the sole question is whether the servant, who otherwise would be indisputably entitled to indemnity must be declared to have consented to take upon himself the consequences of the master's known delinquency. There is no reason for imputing to him an intention to do so. Believing, as he reasonably might, that Bonk had all the authority which he assumed to have, his remaining in the dangerous service was an act of the same quality as if his belief had been well founded. His excuse for incurring the risk of further work upon the machine, viewed with reference to his own conduct, is no less meritorious than if the promise to put a guard about the pulleys had come from Charles-son, or some other of unquestioned authority to make it. The dictates of ordinary prudence, of course, are not to be disregarded, and no promise, by whomsoever made, can justify the incurring of imminent and obvious risks; but while the possibility of injury from the exposed pulleys here in question was obvious, and the company's responsibility for failing to provide a suitable guard clear, the danger was not imminent, and under ordinary circumstances was easily avoided, if the operator was watchful. A like hurt, or serious injury of any kind, had never been received before by any one engaged in operating the machine; and it was therefore not a grossly reckless, or even plainly imprudent, act on the part of Erickson to resume work upon the machine on Tuesday, though he found the pulleys yet unguarded, and no spring provided to keep the boards against the guides. To say the least, the question whether he should be deemed to have assumed the risk involved, or to have been lacking in due care for his own safety, was properly left to the

determination of the jury. It was manifestly a question for the jury whether the defendant in error was guilty of contributory negligence by reason of the manner in which he held the particular board which he was feeding to the machine when the accident occurred. It follows, too, from what has been said, that the court did not err in refusing to instruct, that unless Bonk was in charge of the planing mill "so as to represent the defendant," the complaint made to him was a complaint to a fellow-servant merely, and not binding on the master. The exceptions reserved to the introduction of evidence present no question of importance.

The judgment of the Circuit Court is affirmed.

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